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ALVAH L. STINSON

WOMAN
UNDER THE LAW

By
ALVAH L. STINSON
of the
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Maine Bar
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Boston
Hudson Printing Company
1914

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PREFACE

This volume is dedicated to the aggressively progressive women of this world, in the hope that it may prove useful as ammunition for their combat with defiant conventionality and obstinate conservatism. Knowledge is often the best persuader. The barriers which restrain human liberties are only vulnerable to the vigor born of knowledge. Each thought or word, that prompts the activity which assails, may own its share in the final victory, and none should hold back contribution for fear of its proportionate insignificance.

The most important result of the better civilization of our time is the increased knowledge and power of women. We know that in limited spheres their influence was always incalculably great; but now, without losing their ascendancy at home, they find a career in many of the trades, most of the professions, and all the arts. In those of the arts which give the most lively pleasure and reach the greatest number of persons, namely fiction, and the drama, women, in our day, have attained the first rank, and have made the first rank higher.

I set no limit to their future achievements except that which nature herself has established. So long as the chief business of every state was to defend itself against armed encroachment, all gifts and all character were of necessity subordinate to masculine force. Women were "the subject sex." The peace and safety resulting from the union of many states, and to become universal through federation and arbitration, will still further reduce

the importance of muscle and brawn. The time is not far distant when the ballot will have rendered the bullet not monstrous merely, but ridiculous.

Women have risen to the better chance afforded them by the amelioration of manners. The most fortunate of them have been cruelly obstructed by the large remainder of barbarism which exists in every community, and they have done their work in the teeth of every conceivable disadvantage. They have had to snatch it from a cross-fire of hostile circumstances. That they should have been able to exercise their rare talents at all, and so triumphantly, is a kind of miracle, at which we can but stand amazed.

To avoid the risk of any possible misconstruction I shall offer here a short explanation of my locus standi as regards the whole subject in question.

I have been for some years deeply interested in what has been called the "Woman's Movement" and have taken part in pleading for the higher education of women, for the admission of women to university degrees, for the protection of the property of married women, for the employment of women generally.

I have seen every year more reason to regard the part hereafter to be played by women in public affairs as offering the best hope for the moral and, still more emphatically, for the spiritual interests of humanity. I think more highly of woman since I have watched and noted her keenness from the public platform; and I have more confidence than I had at first, both in her ability and in her stability. But it would be idle to veil the fact that the path of progress on which women have now entered leads up a steep hill of difficulty. Dangers must be faced whenever any time-honored evil is to be swept away or any new good achieved. The rapid progress of woman in public life and affairs could not

now be stopped, if we desired it; nor should we desire to stop it, if it were our option to do so.

I have yet to learn that knowledge and freedom, which are the springs of all the nobler virtues in men, will be less the ground of loftier and purer virtues in women.

Women do not ask favor of men, but justice.

That a woman should really possess public spirit, and that its exercise should be as ennobling to her as it is to man, is a lesson which it takes most men half a lifetime to learn.

It is not then to men that women must look primarily for aid to climb the ascent before them. The work of elevation must be wrought by themselves or not at all. At this hour there are in America thousands of women of the highest social and intellectual rank who desire to see better days for their sex, but who are sitting, sighing and waiting patiently for some tall, grand, masculine Jupiter to descend and lift their chariot out of the ruts of custom. It is in vain; they may so wait forever. Nothing but their own steady and simultaneous labor and a knowledge of the laws relating to their sex can really elevate them.

This book is offered to the public, not as a legal treatise, but as simply an attempt to state intelligently, the rights, privileges, and disabilities of women under the law, especially so far as they are different from those enjoyed by or imposed upon men. Repetitions are intentionally frequent. Take this offering therefore for what it may be worth, for its good wishes if nothing more.

ALVAH L. STINSON.

Boston, Massachusetts, July 1, 1914.

CHAPTER I

COMMON LAW

The condition of woman at common law was little better than that of a slave. A wife has a right to share the bed and board of her husband, and can call upon him to provide her with necessary food and clothing, but she is bound to follow him wherever, in the country, he may choose to go and establish himself, provided it is not, for other causes, unreasonable. She is under obligation to be faithful in chastity to her marriage vow.

A married woman can acquire rights of a political character, which stand on the general principles of the law of nations. When she commits a crime in the presence of her husband, unless it is of a very aggravated character, she is presumed to act by his coercion, and, unless the contrary is proved, she is irresponsible.

Her property rights were put by the marriage very much under the control of the husband. He could manage his own affairs in his own way, buy and sell all kinds of personal property, without consulting her and without her control, and he might buy any real estate he might deem proper; but, as the wife acquired a right in the latter, he could not sell it, discharged of her dower, except by her consent, expressed in the manner prescribed by the laws of the State where such lands lay. Her personal property in possession was vested in him, and he could dispose of it as if he had acquired it; this arose from the principle that they were considered one

person in law. It has been wittily remarked that a husband and wife are one and the husband is the one; I think, however, that in our common experience many husbands regard the husband and the wife as two and the husband the two. At common law the husband was entitled to all the wife's property in action, provided he reduced it to possession during her life. If the wife died before the claims were collected, the husband received them as her administrator, in which case, after payment of her debts, the surplus belonged to him absolutely. He was also entitled to her chattels real, but these vested in him not absolutely, but sub modo: as, in the case of a lease for years, the husband was entitled to receive the rents and profits of it, and could, if he pleased, sell, surrender, or dispose of it during the coverture, and it was liable to be taken in execution for his debts; and, if he survived her, it was to all intents and purposes his own. In case his wife survived him, it was considered as if it had never been transferred from her, and it belonged to her alone. In his wife's freehold estate he had a life estate during the joint lives of himself and wife; and when he had a child by her, who could inherit, he had what is known as an estate by the curtesy.

When necessary the great institution known as the common law would, in deference and fear of an occasional outbreak of humane public opinion, afford some sort of equitable protection to the wife. When, however, it was only possible for the common law to protect but one, it sedulously spread its protecting wing over the husband, and the wife was left to trail as best she could.

At common law a married woman could not bind herself by contract, express or implied, by parol, or under seal, even for necessaries, nor though living apart from her husband, could she

make a binding contract except for necessaries for the benefit of her separate estate; and a contract made by her being invalid would be no consideration for a subsequent promise during widowhood. If her husband neglected or refused to furnish sustenance for her and their children, therefore she was deprived of the right to procure it by pledging her credit which might be good; the most she could do was to pledge, if possible, her husband's credit, which might be bad, and thereby preclude her from procuring necessaries of which she might be in dire need. Her husband might be bound by her acts as his agent, duly authorized; but where payment to her was completed, her authority must be stated. By her own act her authority could not be enlarged; and she could not execute a conveyance, even in release of dower, otherwise than by joining with her husband in a deed to a third person. No promise of a wife could at common law be enforced against her unless she had a separate estate, and then not by a personal decree but only by treating it as an appurtenant out of said estate; and then only for her or its benefit.

The common law disabilities of a married woman could not be avoided by any false representations with respect to her capacity, and no estoppel would be raised thereby; but in the management of her separate property she would be answerable for the fraud of her agent, within the scope of his agency, though she were ignorant of it. The disabilities of a married woman are her personal privilege, and in an action this must be specially pleaded; and no one but the husband can object to a suit against him by the wife, so that a judgment against a firm of which he is a member is good if he does not himself raise the defence. That is to say, the common law in its gracious goodness and gallantry

toward woman, permits her to sue even her husband, provided, however, he does not object. The wife must continually bear in mind that she and her husband are regarded as one person, and that her legal existence is suspended during marriage, or in other words, is merged in that of the husband.

In equity, however, this common law principle has been somewhat modified; and for some purposes courts of equity recognize husband and wife as distinct persons. She may, therefore, bring an action at law against her husband, and upon presenting her case find that she has no standing in court, for she and her husband are one and one cannot maintain legal action against one's self; she may, simultaneously, however, bring an action against her husband in equity, file her papers in the same court, present her case to the same judge, and she will be heard; for in the latter case she and her husband are separate and distinct individuals, as viewed by courts of equity. Thus, the numerical condition of woman is, and ever was, anomalous at common law. If husband and wife are one and they are separated by a decree of nullity or divorce, which is then the one? and, as one from one leaves nothing, which is entitled to the characterization of zero?

At common law the wife is incapable, except in a few special cases, of contracting a personal obligation, even with her husband's consent; and any attempt to do so is not simply voidable, but is absolutely void. Her disabilities in this respect by reason of her coverture cannot be overcome by any form of acknowledgment or mode of execution, or by uniting with her husband in the contract; and where a special or limited power of making contracts is given to a married woman she is still considered as prima facie unable to contract at all, and the burden of proof is on the person relying on the

validity of her contract to bring it within a statutory rule.

At common law, as a general rule, a married woman cannot ratify her post-nuptial contracts during coverture, or after its termination, except on a new consideration. The moral obligation resting on a woman to make good her unenforceable promise given during coverture is not a sufficient consideration to uphold the affirmation of the promise made either subsequently, during coverture, after the removal of her disability by statute or otherwise, or after she becomes discovert.

At common law, as a general rule, a feme covert could not dispose of her personalty by will, except under a marriage settlement or by her husband's consent, or make a valid devise of lands with or without her husband's consent, to any person whatever.

As a general rule, at common law, a feme covert could neither sue nor be sued alone, but she must sue or be sued in connection with her husband.

There was never any impediment to the acquisition of property through purchase or otherwise, by a married woman, arising from disability imposed by coverture, the only difficulty in the way being of trifling consequence (?) namely, that at common law the ownership passed immediately to the husband; and while at common law a married woman is capable of purchasing, yet the husband may disagree and thereby void the purchase.

At common law a married woman is incapable of exercising the right of suffrage, her existence for such a purpose being merged in that of her husband.

At common law a married woman is incapable of entering into a contract and hence at common law for this reason alone she cannot be estopped by contract or anything in the nature of a contract.

At common law if the husband is an alien, and has never been in the realm where the wife resides, she may enter into contracts to sue and be sued as a feme sole. Hence, a premium is placed upon the marriage of women to foreigners by the common law, for by so marrying there is no merger or fiction of two in one and her legal status is the same as before the marriage.

A wife whose husband has been banished or transported for life as a convict, may make a will, contract, and in everything act as a feme sole just as if her husband were dead, he being regarded in such case as civilly dead. It is not difficult under this rule to conceive of many cases where the common law might serve as a tremendous incentive to wanton indifference on the part of property owning and oppressed wives as to their husband's welfare with reference to banishment, transportation and civil death.

As we have seen, the mere fact that the husband has deserted the wife without leaving her the means of support, or that they are living apart, whether she is provided with a separate maintenance or not, will not be sufficient at common law to enable the wife to contract, or to sue and be sued, or otherwise act as a feme sole.

It is a well established principle of the common law that, if the husband abandons his wife and abjures the realm, she may henceforth act as a feme sole. Under this rule, why worry if as the shades of evening fall, the husband fails to appear at the threshold of his domicile, at the accustomed hour?

It has been held that the facts that the husband is insane and is living apart from the wife in an almshouse, will not confer upon the wife any power to bind herself by contract. On the other hand, it has been held that a wife whose husband is insane

and is confined in an asylum outside the State in which she resides, is thereby empowered to sue in her own name for a personal injury, as though her husband were civilly dead. Under this rule, women should be careful to have their insane husbands confined without the jurisdiction of the State of their domiciles.

At common law the husband is said to be the head of the family, and as such the wife must love, honor and obey him. Yet it is difficult to understand how this would be possible, with the husband one of the so called "fathers" of the common law, excepting upon the principle of licking the hand which beats one.

At common law the husband has, as a general rule, a right to the custody of his wife, whose actions he may control and restrain, even by the use of a rod, provided it be no thicker than his thumb. Under this rule it would seem appropriate for prospective brides to seriously consider the thumb dimensions as well as other sterling and manly qualities of their intended husbands.

Under the common law an unmarried female was under the restraint of her parents, a married one, under the restraint of her husband; in fact, it seems that woman at common law was ever and anon under the control and at the mercy of man. Her suckling babe might be torn from her breast by her husband, even though at the time he was living apart from her and in adultery with another woman, so great a favorite was woman under the common law of England.

At common law it was not a criminal offence to leave a wife without the means of support, and, if so left she obtained work and by sacrifice, denial and suffering succeeded in saving a few dollars and deposited them in a Savings Bank, they became the

property of the husband. Even the ring, with which he adorned her dainty and helpless finger at the nuptials, became his property as soon as the marriage ceremony was fully performed, and might be taken for his debts by his creditors.

At common law the personal property which the wife has in her possession in her own right at the time of her marriage, or which comes into her possession during the coverture, whether by gift, bequest, or otherwise, vests absolutely and immediately in the husband without any act on his part asserting his marital rights, and he may dispose of it as he pleases; it becomes immediately liable for his debts, and on his death it goes to his personal representatives.

The husband has the right to dispose of the body of his deceased wife by sepulchre in a suitable place. He has control of the body and may select the proper place for the interment, regardless of the wishes of his wife's parents or their relatives. And this carries with it the right of placing over the spot of burial a monument or memorial of such style and form as he may desire.

At common law the husband upon marriage becomes possessed in the right of the wife to her chattels real, and he may forfeit, sell, assign, mortgage, or otherwise dispose of them as he pleases, without her consent by any act in his lifetime, and they are liable to be sold for his debts. Upon her death they vest absolutely in him if he survives, and his rights in these respects apply to equitable as well as to legal terms for years.

As a general rule, the wife's choses in action which belonged to her at the time of her marriage, or which she acquires during coverture, belong, at common law, to the husband.

At common law the husband is entitled not

only to all the personal property which the wife owns at the time of her marriage, but which is reduced to possession during coverture, but also to her services, and whatever she acquires by her skill or labor during coverture belongs to him, as we have seen. The husband's right in this respect is absolute. If the wife makes, in her own name, a purchase of her own, it enures to the husband's benefit and is liable for his debts, and if her earnings are paid to her without the authority and against the direction of the husband, he may, nevertheless, recover them. Money due for the wife's services is a chose in action, which, as a general rule, does not require reduction into possession for the purpose of defeating the wife's right.

Even in equity the wife's earnings do not become her property without a clear, express, irrevocable gift, or some distinct act of the husband divesting himself of them, or setting them apart to her separate use.

The wife has no interest in the husband's realty except dower.

In jurisdictions where, by the common law, the wife is entitled to a distinctive share in the husband's personalty, it is conceded that the husband has the power to dispose absolutely of his personalty during his lifetime by sale or gift, and if he reserves no right to himself, the transfer will prevail against the wife, though made to defeat her claim.

"Pin money" so called is an allowance made to the wife by the husband in his great mercy, aided by the Court, for personal dress, decoration, and ornament; this allowance being intended for the adornment of the wife and not for accumulation, the acceptance from the husband of clothes and other necessaries, will be a bar to any arrears of pin money during such time as she is so provided.

Sometimes the allowance is made out of the wife's profits and savings from her housekeeping. Sometimes the husband makes an arrangement for pin money by marriage settlement.

It is a well established doctrine of the common law that husband and wife cannot make a valid contract with each other during coverture. The reason for the doctrine generally assigned is that the wife having lost her legal entity, she and her husband are one person in legal contemplation and it would be absurd for a person to enter into a contract with himself.

At common law the wife had no power to appoint a third person to act in her stead, and hence it is said she could not authorize her husband to become her agent, but, even if she had been given the power to appoint a third person to act in her stead, it is difficult to understand how she could have authorized her husband to so act, because he would not be a third person, under the rule making husband and wife one person.

At common law the wife cannot maintain a civil action to recover damages against the husband for personal injuries, as, for instance, assault and battery, false representation or slander, committed upon her during coverture, or even after the dissolution of marriage by divorce; nor, it has been held, could she maintain such action against one who acts with her husband, and under his direction, in doing the injury.

At common law it is the duty of the husband to support the wife, and, if he refuses or neglects to supply his wife with what is necessary, she may procure it, as we have seen, for herself on his account and at his charge, provided he has any credit; otherwise she must go without.

Necessaries, under the above rule, consist of

food, drink, clothing, washing, medical attendance, and a suitable place of residence. It has been held, however, that the services of a clairvoyant, or of persons in mesmeric dreams, were not necessaries. Those were regarded as "fancy articles."

In England the wife has the same power of pledging her husband's credit for the costs due to her solicitor in a suit for a dissolution of a marriage as the costs in a suit for divorce. But legal services rendered to a wife are not by great weight of authority in the United States recognized at common law as coming within the list of articles known as necessaries, for the obvious reason that necessaries are to be provided by a husband for his wife to sustain her as his wife and not to provide for her future condition as a single woman, or, perhaps, as the proud and happy wife of another.

At common law the person of a married woman during coverture could be taken in execution upon a joint judgment against her and her husband for her ante-nuptial debts whether the husband was or was not arrested.

Her common law disability is not removed by the so-called married woman's acts which operate only to give her such capacity as is expressed in them.

The rigor of the common law disability of a married woman, and the merging of her individual and property rights in her husband, gave rise to certain equitable remedies against her husband, intended, to secure at least a portion of her property to the use of herself and her children; but to the ordinary equitable estate of a married woman, the marital rights of the husband attach.

The common law has been called a great institution, and, no doubt, it does embody the thought and wisdom of many great minds; but has it been

fair to women? In this connection it may be interesting to learn something of what is meant by the term "common law."

It is considered to be that system of law or form of the science of jurisprudence which has prevailed in England and in the United States of America, in contradistinction to other great systems, such as the Roman or Civil law,—or, those principles, usages and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express or positive declaration of the will of the legislature,—or, the body of rules and remedies administered by courts of law, technically so-called, in contradistinction to those of equity and to the canon law. Generally, the law of any country, to denote that which is common to the whole country, in contradistinction to laws and customs of local application.

Under the common law neither the stiff rule of a long antiquity, on the one hand, nor, on the other, the constant changes of a present arbitrary power are allowed ascendency, but, under the sanction of a constitutional government, each of these is set off against the other. So that the law of the people, as it is gathered both from long established custom and from the expression of the legislative power, gradually forms a system, supposed to be just, because it is the deliberate will of a free people, excepting those who are not permitted to express their wills; supposed to be stable, because it is the growth of centuries; progressive because it is amenable to the constant revision of such of the people as have a right to expression concerning it.

A full idea of the genius as well as the peculiarities of the common law cannot be gathered without a survey of the philosophy of English and American history. Perhaps the most important of

the narrower senses in which the phrase "common law" is used, is that which it has when used in contradistinction to statute law, to designate unwritten as distinguished from written law. It has been called the law which derives its force and authority from the universal consent and immemorial practice of the people. Of course, it derives no power whatever from those who are not permitted to express their consent. It has never received the sanction of the legislature by an express act, which is the criterion by which it is distinguished from the statute law.

The statutes are the expression of a law in a written form, which form is essential to the statute. The decision of a court which establishes or declares a rule of law may be reduced to writing and published in the Reports; but this report is not the law; it is but evidence of the law; it is but a written account of one application of a legal principle, which principle, in the theory of the common law, is still unwritten. However artificial this distinction may appear, it is, nevertheless, of the utmost importance, and bears continually the most wholesome results. It is only by the legislative power that law can be bound by phraseology and by forms of expression. The common law eludes such bondage; its principles are not limited nor hampered by the mere forms in which they may have been expressed, and the reported adjudications declaring such principles are but the instances in which they have been applied. The principles themselves are still unwritten, and should be ready with all the adaptability of truth to meet every new and unexpected case.

It is said that the rules of the common law are flexible, but we frequently find Judges stating what

the law is instead of what it ought to be, as if it were as inflexible as a rod of iron.

The statute or written law is naturally inflexible and has no self-contained power of adaptation to cases not foreseen by legislators; so that in course of time they became supplemented, explained, enlarged, or limited by a series of adjudications; until, at last, it may appear to be merely the foundation of a larger super-structure of unwritten law. It naturally follows, too, from the less definite and precise forms in which the doctrine of the unwritten law stands, and from the proper hesitation of courts to modify recognized doctrines in new exigencies, that the legislative power frequently intervenes to declare, to qualify, or to abrogate the doctrines of the common law. Thus, the written and the unwritten law, the statutes of the present and the traditions of the unholy past interlace and react upon each other. Historical evidence supports the view which these facts suggest—that many of the doctrines of the common law are but the common law form of antique statutes, long since overgrown and imbedded in judicial decisions. While this process is doubtless continually going on and to a very considerable extent, particularly in the United States, the doctrines of the common law are being reduced to the statutory form, with such modifications, of course, as the legislature may choose to make.

In a still narrower sense, the expression "common law" is used to distinguish the body of rules and of remedies administered by courts of law technically so called in contradistinction to those of equity administered by courts of chancery, and to the canon law, administered by the ecclesiastical courts. In this country the common law of England has been adopted as the basis of our jurisprudence

in all the states except Louisiana. Perhaps this is because Louisiana is, or has been called, the "female" state, and has a decent regard for her sex.

The common law of England is not in all respects to be taken as that of the United States or of the several states. Its general principles are adopted only so far as they are applicable to our situation, and the principles upon which Courts discriminate between what is to be taken and what is to be left have been much the same, whether the common law was adopted by constitution, statute or decision. It cannot be overlooked that notwithstanding the broad language of the Constitution there were many particulars of the common law of England as it stood prior to 1776, which never have, in fact, been regarded by our courts as in force in this country.

In criminal law the common law is generally in force in the United States to some extent, and, while it is in some states held that no crime is punishable unless made so by statute, there are, in many states, general statutes resorting to the common law for all crimes not otherwise enumerated, and for criminal matters generally. When there is no statutory definition of a crime named, the common law definition is generally resorted to; as also are its rules of evidence in criminal cases for all practice as well as principles in the absence of statutes to the contrary. And in Louisiana, although not recognized in civil matters, the common law in criminal cases is expressly adopted. It has been held to prevail in the District of Columbia as to theft, in Maryland as to conspiracy, in New Hampshire as to kidnapping, and in Maine as to homicide with intent to kill.

There is no common law of the United States as a distinct sovereignty, and, therefore, there are no common law offences against the United States.

CHAPTER II

MARRIAGE SETTLEMENTS

A woman and man may make valid contracts with each other in contemplation of marriage. Such contracts are not uncommon and it is of great importance that every woman, intending to enter marriage, should have something more than a vague idea concerning them.

These contracts are known in the law as ante-nuptial agreements, or marriage settlements, and relate, almost exclusively, to the respective property rights of the parties.

Ante-nuptial contracts are frequently made in cases where there are children by a former marriage which the father is desirous of protecting by making some legal provision for them respecting his property.

Property may be settled upon the prospective bride even though the husband is in debt at the time; and the personal property of the wife, consisting of her patrimonial fortune in the hands of her guardian whilst it remains separate, capable of being identified and distinguished, which has not been reduced to possession by the husband and which could not be reached by his creditors by any direct process of attachment, may, by the joint act of husband and wife, be settled and secured to the wife and her children, and such an assignment cannot be set aside as fraudulent against creditors.

The validity of a marriage entered into in regular form, however, is unaffected by the pre-

liminary agreement of the parties not to live together. It is against the policy of the law that the validity of the contract of marriage or its effect upon the status of the parties should be in any way affected by their ante-nuptial or collateral agreements. An ante-nuptial agreement, therefore, never to live together as husband and wife, is held to be a mere nullity so far as the marriage contract is concerned. These contracts are not resorted to as frequently as a means for protecting the wife as they were prior to the legislation whereby her rights were enlarged, but every woman about to enter upon the marriage state should inform herself as to her rights and liabilities thereunder.

It must be borne in mind that they may be used to protect the rights of the man as well as those of the woman.

The validity of such settlements may be especially affected by the form of the settlement, the execution and recording thereof, the capacity of the parties thereto, the consideration upon which it is made, and the fairness of the transaction; which matters will now be discussed.

A marriage contract need not contain technical words; it need only appear that there was a final enforceable promise in regard to marriage rights in, to or over property, or in consideration of marriage. But a marriage settlement is subject to the operation and effect of all general laws as to the recording of instruments affecting rights in real estate or personalty, and there are generally special statutes besides, which must be complied with.

In some states statutes require marriage contracts to be witnessed, acknowledged, recorded, accompanied with a schedule, etc. In general, the noncompliance with such statutes renders a marriage contract void as to creditors only; between

the parties it is valid although unrecorded, and as to creditors, it is valid if they have actual notice. Acknowledgement, when required, cannot be made after marriage. If execution be proved, delivery will be presumed.

The English Statute of Frauds, providing that no agreement in consideration of marriage shall be enforced unless in writing, and similar statutes, are in force in many states. Under such statutes if the consideration be other than marriage, the statute does not apply. A note or memorandum of the contract, as by means of letters, etc, if it contains the terms of the contract, the consideration, as well as the promise, is sufficient a writing, and binds the parties; though, if made after the marriage, not intervening creditors. The contract need be signed only by the party to be charged. If the contract is wholly performed, the statute does not apply; as, if A, having orally promised to give B certain slaves when B married C, gives him the slaves, B can hold them against A's executor. So if it has been performed by the party seeking to charge (not if only by the party sought to be charged); as, where A and B about to marry agree orally that A shall have B's notes and bonds, absolutely, if he pays her a certain allowance during her life; after her death her administrators cannot claim such notes, etc., on the ground that the contract was not in writing. But marriage itself is not part performance. If the statute is not pleaded, the court will decree performance of a marriage contract, though oral.

The capacity of the parties, with certain exceptions as to age, is that required for the execution of any other contract.

Statutes sometimes enable infants to make valid marriage contracts to bar dower. In the

absence of such a statute, the marriage contract of an infant is binding on the other party (if adult); but voidable by the infant on attaining full age, or within a reasonable time thereafter, or by the infant's successors in estate, or privies in blood. If not beneficial, it is absolutely void. Where the husband took her personalty absolutely by marriage, the wife's contract as to her personalty has been held valid. Infancy can be objected to only by the parties themselves. An infant may make a valid marriage contract through her guardian.

The consideration of such a contract may be any valuable consideration, reciprocal stipulations, or the marriage itself.

Marriage is a consideration of the highest value, and any contract or promise which brings about, or helps to bring about, a marriage is binding when the marriage has taken place, although it be invalid, and even when it does not take place owing to the settlor's death; against the settlor and those claiming under him, in favor of the husband and wife, their issue, the issue of a former marriage, collaterals, and even strangers; against the settlor's creditors, in favor of the husband and wife and their issue, although such issue were born before the marriage, but not collaterals, etc. Although an existing marriage is no consideration, a contract in consideration of a marriage made after the marriage, in pursuance of and conforming with an agreement made before, is as valid against the settlor as if made before; but is valid against intervening creditors only if the agreement made before were enforceable. When another consideration is expressed in the contract, marriage cannot be shown to have been the consideration; and where marriage is the consideration, the failure of the wife's fortune cannot be alleged as a failure of consideration.

As between the parties, any concealment by one party as to the value of his or her property will render a marriage contract relating thereto voidable. Persons about to marry do not, like buyer and seller, deal at arms' length, but stand in a confidential relation requiring the exercise of the greatest good faith. If the provision secured to the wife is manifestly unreasonable and disproportionate to the means of the intended husband, it raises a presumption of intended concealment, and throws on him the burden of disproving the presumption.

As against creditors, if both parties intend, or if the settlor intends and the settlee has notice of such intent to hinder, delay or defraud his creditors, the contract, to the extent at least of the settlor's debts, is void, no matter what the consideration; but not if the settlee has no such intent or notice; and mere knowledge of the settlor's indebtedness or insolvency will not amount to fraudulent intent or notice, though they may go to prove it, just as the unreasonableness of the settlement may. A provision by which the settlor retains the property until his insolvency is void.

If marriage precipitates insolvency, it is all wrong; if insolvency precipitates marriage it is all right.

A marriage contract is not merged or destroyed by the marriage of the parties. If executed, it will be upheld, in equity, and, after the dissolution of the marriage, at law; if executory, it may be specifically enforced during marriage, in equity, or sued upon after the dissolution of marriage, at law. If it carries out the intentions of the parties it cannot be modified or set aside unless all the parties interested consent, or are brought before the court; if it does not carry out such intentions, it may be reformed in equity. If lost or destroyed, equity will

revive it, so, if countermanded fraudulently by the husband before marriage, its execution will be decreed. A party does not lose his rights upon it by misconduct, or by failure to perform his part, or by divorce alone; but he may by long acquiescence. The issue, when interested, have a right to have it enforced.

In construing marriage contracts the true intent of the parties will be carried out liberally, without regard to the strictly technical meanings of words used; when possible, issue will be included in the benefits of the contract, and as issue, children of a former or subsequent marriage, but not grandchildren. Statutes requiring the recording of such contracts will be strictly construed, and only in general for the protection of creditors.

A marriage contract, if valid where made, is valid everywhere, unless prohibited in the place where it is sought to be enforced. So that when such a contract is valid in matter and in form (recorded, etc., if necessary) by the law of the place where it is made, its validity is not affected by the subsequent removal of the parties with the property into a State where it is not in form; but it may be invalid if in such place it is unlawful per se.

A marriage contract invalid per se where made is invalid everywhere, but if invalid because wanting in form where made, but valid where it is sought to be enforced, it may in the latter place be enforced.

A marriage contract as to its effect is governed by the law of the place where it is made, unless it is made by the parties with the intention of having it performed elsewhere; in which case it is governed by the law of the place where it is to be performed.

A marriage contract to convey or charge real estate must be valid in matter and form by the law of the place where the land lies.

The term post-nuptial settlement used in this article includes all transfers of property, direct or indirect, between husband and wife, as well as all settlements made on them by third parties, such as have already been discussed. Transfers between husband and wife may depend for their validity upon; (1) the capacity of husband and wife to contract together (see chapter on Husband and Wife); (2) the form of the settlement; (3) the consideration; (4) the absence of fraud or duress between the parties; (5) the absence of fraud on the rights of creditors. Such transfers may be wholly or partially valid or invalid. Thus, post-nuptial settlements are usually valid between the parties; one may be binding on the settlor, his heirs and representatives, and his voluntary assignees, but invalid as against his creditors; valid as to some (subsequent) creditors; but invalid as to other (existing) creditors; valid as to part of the property settled, but invalid as to the rest; invalid as an absolute grant, but valid as a security. Whether a settlement is, when it is valid between the parties, but otherwise invalid, void, or voidable, does not seem to be clearly determined. Though "void" is usually the word used, the better opinion seems to be that it is voidable only. For, a bona fide purchaser for value from a settlee whose title is invalid against creditors, gets a valid title even against such creditors, which could not be the case if the original settlement was absolutely void against them; and this is true of both realty and personalty; so property previously conveyed in fraud of creditors does not pass by a deed from the settlor for the benefit of such creditors; so, only a creditor can allege the invalidity of the settlement. The reason the word "void" is so often used is that in the great mass of cases no special proceeding need be resorted to to

have a settlement declared void, but the question of validity may be determined in any proceeding at law or in equity to which both the settlor and settlee or their respective successors are parties.

There is no particular form necessary, nor are technical words required, in drawing post-nuptial settlements, except where statutes apply. Some of the different forms which transfers are likely to take are discussed later in this chapter.

In some states all transfers of property between husband and wife must be recorded, or ratified by a court; in others, a wife must file a statement of all her separate property of which her husband has possession; and generally a married woman cannot release her marriage rights except by writing or deed. But acts requiring record of marriage settlements apply only to those in consideration of marriage, not to post-nuptial settlements. Otherwise the formalities are the same as in transfers between strangers.

A consideration is necessary to render an executory contract enforceable, whether at law or in equity, and to render an executed settlement valid as against creditors; but voluntary settlements or executed gifts are binding between the parties. A voluntary settlement is one without consideration. Love and affection is a meritorious consideration; it serves often to explain a grantor's purpose and to disprove a fraudulent intent; it is a good consideration as against the grantor and his representatives; but it is not a valuable consideration, it will not sustain an executory contract at all, or a settlement in prejudice of the rights of creditors. Existing marriage is a consideration of the same kind; as is a husband's desire to make provision for the support he owed his wife.

Each of the following is a valuable consideration: a release of dower, or homestead, previous settlement, or separate property rights; an antenuptial enforceable promise to make a settlement; an existing debt though barred by limitations; a wife's equity of settlement; use of property with understanding that it should be replaced; cash received as a loan; rents collected as agent; wife's right of survivorship in mortgage to her. It is a valuable consideration for a settlement that a court of equity would have compelled its execution. If husband and wife, each of them having interests, no matter how much, or of what degree, or of what quality, come to an agreement which is afterwards embodied in a settlement, it is a bargain and a transaction on valuable consideration.

Each of the following is a mere nominal consideration, really no consideration at all. The wife's property which by law is the husband's; dower previously voluntarily released; property previously voluntarily given up; cohabitation, when this is a duty; the wife's services when these belong to her husband.

As a general rule, if a consideration is real (valuable), its adequacy is not enquired into. But inadequacy of consideration is evidence of fraud. And, as against creditors, the consideration for a settlement must be fair and reasonable; the payment of a trivial sum, or such disproportionate consideration as two hundred and seventy dollars, for property worth two thousand dollars, or four hundred dollars for property worth eighteen hundred dollars, will not defeat creditors' rights; as to them the settlement is voluntary to the extent of the excess; and though, if the settlee has acted in good faith, he or she will be protected as a creditor, and the

settlement treated as a security for the actual consideration.

In the case of bad faith he or she will not be protected at all.

Formerly a married woman was deemed entirely under her husband's control, and incapable of voluntary acts in his presence, and even now her torts and crimes committed in his presence are presumed committed under his coercion. So in the case of contracts. These at common law were void, and good in equity only if proved to have been fairly and freely made. But now, although the greatest good faith is required in dealings between husband and wife, which are treated much as dealings between trustee and cestui que trust are, and in case of a gift by her to him, or an inadequate consideration, or an advantage secured by him, the burden of proof is on him to show that the transaction was freely and deliberately concluded; the mere fact that he is her husband does not render it a fraud for him to take property from her; but she must prove fraud or undue influence, and allowance will be made for their intimate relation. The husband's fraud or duress will not affect the validity of a wife's transfer in the hands of a bona fide purchaser for value; she cannot have her deed to a third party set aside on account of her husband's conduct, unless they were confederates, or the husband acted as such third party's agent in obtaining the deed. In spite of fraud, equity will sustain a settlement between husband and wife if for the benefit of them both. Generally, courts of equity alone will afford them relief.

Husband and wife are one, and it is a great temptation for a husband to place property in his wife's name in order to secure himself. Innumerable cases have therefore arisen where the creditors

of a husband have attached transfers to his wife and sought to have them declared void, and the principles applicable to such cases are quite well defined. A transfer by which the grantor hinders, delays or defrauds his creditors is called a "fraudulent conveyance." Such conveyances are of two kinds, those which are made with the intent to evade creditors, where there is fraud in fact, and those where there is no such intent, but which being voluntary, prejudice creditors' rights, where there is fraud in law. The usual rules as to fraudulent conveyances apply generally to conveyances between husband and wife. But the subject is too vast to be minutely treated herein.

Statutes Protecting Creditors.—The statutes relating to this subject which are constantly referred to, which are merely declaratory of the common law, which, as a part of the common law, are in force in many states, and which form the basis of most modern statutes against fraudulent conveyances, are: 13 Eliz., ch. 5, and 27 Eliz., ch. 4. Statute 13 Eliz., ch. 5, provides that all transfers made to the end, purpose, and intent to delay, hinder or defraud creditors and others of their lawful rights are "utterly void" as against such creditors and others; but does not affect bona fide transfers for value. Statute 27 Eliz., ch. 4, provides that all transfers made for the intent and purpose of defrauding subsequent purchasers are "utterly void" as against such subsequent purchasers; but does not affect bona fide transfers for value. These statutes are construed liberally, and alike at law and in equity; but while at common law fraudulent intent was a mere question of fact, under these statutes it became in part a question of law. The general statutes on the subject in the several states are given the same effect as these statutes in spite of somewhat different

wording; but the modern system of public records has greatly diminished the importance of Statute 27 Eliz., ch. 4. There are, moreover, such statutes as that in Maryland, which provide that no acquisition of property by wife from husband shall be valid if made in prejudice of the rights of his creditors, and these seem to add nothing to the common law. Bankruptcy acts may also affect such conveyances, for a conveyance by a husband to his wife of all his property is an act of bankruptcy; and other collateral statutes may protect creditors.

Existing Creditors.—If a debtor transfers his property for adequate valuable consideration, his creditors cannot complain unless his actual intention in making the transfer was to defeat or prejudice their rights, and was shared in by his grantee. Still, in the absence of statute, a mere preference of a bona fide creditor is lawful, irrespective of intent, and even though the debtor divests himself of all his property. But where the transfer is voluntary, the law raises, in favor of existing creditors, a presumption of fraudulent intent, which in some old cases, and even now in some states, is, irrespective of the amounts of indebtedness, of the debtor's means, and of the property transferred, conclusive; but which, by the great weight of authority, may be rebutted by showing the purity of the grantor's intent and the reasonableness of the provision. The rule as stated by the Supreme Court of the United States reads: "The ancient rule that a voluntary post-nuptial settlement can be avoided if there was some indebtedness existing has been relaxed, and the rule generally adopted in this country at the present time (1873) will uphold it if it be reasonable, not disproportionate to the husband's means, and clear of any intent, actual or constructive, to defraud creditors"; and this rule is generally adopted, even

where a statute expressly provides that a transfer from husband to wife "in prejudice of the rights of subsisting creditors" shall be invalid. A husband's love and affection for his wife, and a desire to secure her support, is ample reason for a gift to her; still his actual intention is a mere question of fact; but whether the gift is a reasonable one considering his circumstances seems to be a question of law. It is reasonable if his debts are trifling, or if he retains enough to readily pay them all; but unreasonable if his debts are so great as to embarrass him, or if he is insolvent, or if the gift leaves him insolvent, or if he denudes himself of all his property, or if the property he conveys is easily accessible to creditors, while that which he retains, though ample in amount, is inaccessible to them.

Subsequent Creditors.—A settlement is valid as against those who become creditors after it is made, unless there is an actual intent to defraud them; and if the settlement is on valuable consideration, unless the intent is shared in by the grantee. Transferring property with the intention of thus withdrawing it from the operation of debts about to be assumed is fraud in fact, and the transfer of all one's property is strong evidence of such fraud. A subsequent creditor cannot attack a settlement on the ground that it defrauds existing creditors; but if a settlement is set aside by existing creditors, subsequent creditors may come in pari passu with them.

Property Exempt.—Any property of a husband, personal or real, which his creditors could not proceed against, he may, as against them, settle upon his wife. Thus, there is no fraud, in law or in fact, in a conveyance by him to her of the homestead; or of her earnings, or cattle if they are exempt; or of her choses in action, which are not his

till reduced to possession, and which his creditors cannot compel him to so reduce.

Fraudulent possession is discussed in the chapter on Husband and Wife.

The remedies for enforcing a postnuptial settlement depend largely upon the modes of procedure in the different states. As between husband and wife there are some special disabilities which have been discussed under title Husband and Wife. Usually such settlements are enforced in equity. There the wife may have it specifically performed, or rectified; and where she and her husband have conveyed her property in trust for her sole and separate use, she may after his death have it conveyed back to her; so when he has bought property in his name with her money, she may compel him to convey to her. But the grantor cannot revoke a settlement or have it set aside, except for fraud. No one not a party or creditor has any remedies at all.

As to Creditors.—Courts of law and equity have concurrent jurisdiction over fraudulent conveyances; a creditor may treat the settlement as voidable, and apply to equity to have it set aside, or as void and attach personalty, or having bought the realty sue in ejectment. But if the grantor has never held the legal title, as where a husband has made a purchase and taken the deed in his wife's name, the creditor must proceed in equity; so in the case of bona fide valuable, but inadequate, consideration.

Deeds of settlement between husband and wife, especially in the case of separation, are common, and though it is usual to make them through the intervention of trustees, this is not necessary, but where a trustee is needed the husband is treated as such. Such deeds are always good in equity if

equitable. To exclude the husband's marital rights in real estate the deed should contain express words, but every gift of personalty from husband to wife is presumed to be for her sole and separate use. In other respects such deeds are like deeds between strangers; for example, they may be delivered in escrow, and they are binding on the parties by estoppel. All the property rights of the parties are often settled by deed.

Gifts of personalty between husband and wife are usually good in equity if not at law; but as they are transfers of property without consideration, they are invalid as against creditors, whose rights they prejudice. Gifts causa mortis differ from gifts inter vivos only in that the former are revoked if the donor does not die as expected, and are therefore not separately discussed. The two essentials of a gift are, (1) the donor's intent to vest the title in the donee; (2) the execution of such intent by actual or constructive delivery. If a gift is good only in equity, it must be fair, reasonable, not extravagant; in fine, equitable. But once executed a gift is irrevocable; except under the civil or Spanish law.

(a) **The donor's intention** to vest the title in the donee must be clearly proved, and is a mere question of fact, as in the case of gifts between strangers. But special presumptions arise from the relation of the parties. Thus, if a husband buys property in his wife's name, a gift thereof to her is prima facie presumed; so if he takes a promissory note for a debt due him payable to her, or puts stock in her name, or deposits money to her credit; so if a note is taken payable to him and her, though he may dispose of it during his life, and perhaps by will, she takes it as survivor. Still, these presumptions may always be rebutted and the real intent

shown. On the other hand, when a wife consents to her husband's expending her money, a gift of it to him is presumed, unless she shows that their intent was different; for example, that he received it as her agent, or as a loan. So a gift is presumed if by her consent he changes her realty into personalty, where personalty is by law his; but the mere possession and user of her chattels by him is of itself no evidence of a gift from her to him.

(b) **Delivery Must be Clearly Proved.**—A mere declaration, as, "I give you this property," without delivery is merely an inchoate gift, and is treated as a promise to make a gift—a promise which not even courts of equity enforce. The same is true though the declaration be in writing, but not if the writing be under seal, by virtue of the principle of estoppel. Declarations are usually evidence only of intent; delivery must be proved by facts showing actual, constructive, or symbolic change of possession. When, however, a husband purchases property for his wife as a gift, delivery to him is delivery to her, and subsequent possession by him is her possession. So that, when a husband bought a horse for his wife, the gift was upheld, though he kept the horse in his stable. But it might have been otherwise had he first bought it for himself and then given it to her, as when he gave her a wagon, but retained possession thereof and used it as before. Except in the case of personal ornaments and apparel, it is very difficult to prove actual delivery between husband and wife who are living together; as, for example, delivery of household furniture, and especially so when the question of fraud against creditors arises. And it may be said that the only safe delivery is by instrument under seal as between the parties, and by recorded instrument as against creditors. Delivery by order is not

perfected until the order is accepted or executed; until such time it may be revoked and is revoked by the donor's death.

Delivery is not perfect unless accepted by the donee.

A deposit by a husband of his own money in the names of himself and wife is not in itself a gift to her, and if it is simply payable to her she is a mere agent to draw it, and her agency ceases on his death. If the deposit is made in her name alone, its effect depends on the circumstances of the case; prima facie, except where the community system prevails, it is a gift to her, good against his heirs, though not against his creditors; but it may be shown that it was not a gift to her, as where it was entrusted to her for the support of the family. Of course as between her and the bank she may draw it, if the deposit is in her sole name. So if she deposits his money with his consent in her name, the deposit is deemed a gift to her. But a gift by a husband to his wife of a deposit in his name, must be perfected by delivery. A check alone is not delivery, and if he dies before his wife draws the money or has the check accepted, the gift does not take effect.

Some difficult questions sometimes arise where the property of a husband and a wife has been so mingled as to be beyond identification, but these questions will be found soluble upon principles already discussed. If an ascertainable sum of a wife's money is mingled by her husband with his own without her consent, or upon no understanding that it shall be returned, she is to the extent of such sum her husband's cestui que trust or creditor; but her consent alone to such a course is merely evidence of a waiver of her rights and of a gift to him. If, however, the amount of money so mingled is not ascertainable, she cannot recover from him

or his estate. In many cases a married woman must keep her separate property separate.

When a wife's services belong to her husband he may abandon all rights to her future earnings. If by statute a wife's "separate" earnings are hers, she has thereby no interest in money earned jointly with her husband; and usually when husband and wife are in business together without any special understanding, it is presumed that the wife intended to give her services to her husband. A husband may give his wife his own services, whether he does so or not raising many questions.

(a) **General Rule.**—A husband may, as his wife's agent, manage her separate property or separate business with or without compensation; but neither he nor any creditor of his has, in the absence of special agreement, any right in the property managed, earned or accumulated through his agency. Partnerships between husband and wife are not included within this discussion.

(b) **Express Contract.**—Contracts between husband and wife are in most states void, and therefore there is usually no express contract by a wife to pay her husband for his services. In cases when such contract can and does exist, she may even be made his garnishee; but in the absence of such contract neither he nor any creditor of his has any right against her or her property.

(c) **Implied Contract.**—There is no implied contract that a wife will pay her husband for his services. His first duty is to support her and his family, and in helping her to make her property productive he is but discharging this duty, and is presumedly amply compensated with the home and support she allows him. Moreover, as one's talents and capacity to labor are not property, and as therefore no debtor can be made to work for his creditors, a

husband who is entitled to his wife's services may give them to her even against his creditors, and may likewise give her his own labor, but not his accumulations.

(d) **Apparent or Pretended Agency.**—A husband may thus, as his wife's agent, manage her property or business without acquiring any rights in said property or business, or subjecting it to the claims of his creditors. But while apparently her agent and pretending to act in that capacity he may be conducting a business of his own under her name simply for the purpose of evading his creditors, or he may be using her property as a gift to him, or as a loan; in such cases the business is his and the remedies of his creditors against the assets thereof are full. So when she has no power by statute to trade, but with his consent is in a business which he conducts, it is his business; the right of his creditors against a business which he conducts can be questioned only when by statute she can trade alone. When he has been using her property in his business, her rights are at best those of a creditor. In some cases where a wife has amassed a fortune through the efforts of her husband, it has been held that a court of equity would in favor of his creditors make some apportionment—treat the husband and wife as it were as partners. Whether the business is the husband's or the wife's is simply a question of fact, the burden of proof being generally on the wife to show that the business was hers. So whether there is fraud is a question of fact.

(e) **Illustrations.**—Thus, where a husband with his team did a great deal of work on his wife's property, and his creditors attempted to sell the crop for his debts, the court held that he could give to her the labor of himself and his beasts, and that the accretions to her property continued hers and could

not be touched by his creditors. Where a manufacturer of large experience failed, and then started up again with his wife's money and in her name, and made a fortune, the court allowed her her money and interest, but held the remaining profits for his debts. Where, while the wife's earnings belonged to her husband, he consented that she should trade in her own name, but took part himself in the business, the business was held his, and therefore liable for his debts.

(f) **Statutes.**—In some States there are statutes expressly referring to this subject.

The land of one spouse is not liable for improvements placed upon it by the other, either to such other or to such other's creditors, except (1) in the case of a contract by the owner of the land which renders it liable, or (2) as against creditors in the case of actual fraud. As a general rule improvements placed upon real estate without any agreement of the owner to the contrary, become a part of the realty and are lost to the party who places them there and to his creditors. As between the parties in the absence of contract there seems to be no ground even for equitable interference, although, when a husband improperly uses his wife's money to improve his lands equity will cause her to be reimbursed when the lands are sold. Nor ought a wife's land to be liable at all for improvements placed on them against her wishes or without her consent. But when a husband, who, within the knowledge of his wife, is indebted, with her consent improves her property, and becomes unable to pay his debts, there is good ground for equitable interference.

(a) **When a husband buys with his wife's money in his own name,** there arises a resulting trust in her favor, unless a different intention on her

part is shown, and the burden of proof is on the husband to show she intended a gift to him, which is, however, prima facie established by proof of her knowledge and consent. The wife, on her part, must clearly show that her money was paid. When such a resulting trust has arisen, the husband's creditors cannot complain if he conveys the legal title to her though he does so to defeat their remedies against the property. While this property is not liable for the husband's debts, his bona fide assignee for value without notice takes it clear of the trust.

(b) **When a husband buys with his own money in his wife's name,** the transaction is deemed an advancement and gift to her, unless a different intention on his part is shown, as where she had agreed to hold it for him, or was invested with the title for his convenience, he being ill, or a foreigner. In such cases no resulting trust arises in favor of himself, or his heirs, but one does arise in favor of such creditors of his as could have set aside a direct conveyance of equal value from him to her, that is to say, existing creditors, unless the settlement was fair and reasonable, but not subsequent creditors, unless there was fraud in fact. For a married woman may be trustee, even by implication and against her will. Still in these cases she is trustee only to the extent of the money paid by her husband.

(c) **Every purchase by a married woman in her own name** is deemed to have been made with her husband's money, but she may show that her funds were used. So if she paid only a part she is directly interested in the purchase to that extent, and holds the title as security when it is assailed by her husband's creditors.

(d) **A purchase by a married woman with her husband's funds in her own name** is deemed a

settlement by him on her, unless it appears that she did so wrongfully, or with a different purpose.

(e) **A purchase with the money of both in the name of one** is deemed a gift to that one, unless the other shows a different intent, or a breach of trust. If the purchase is in the name of both, a tenancy by entireties is created.

(f) **A resulting trust** can be enforced only in equity.

A wife has a direct interest in the life of her husband, which may be insured by him (and by her under special statutes) for her benefit. When such insurance has been made the policy is her separate property, the proceeds belong not to the community but to her and her representatives; she may assign it, even for her husband's debt; but such assignment must be free from fraud and duress. He cannot assign it or defeat her rights, as by a fraudulent surrender, nor can either of them so defeat the rights of children, who are also beneficiaries; still, if he survives her he may surrender a policy taken out for her benefit, or dispose of it by will, or have another person, as a second wife, made beneficiary. Her separate estate is not, however, liable for the premiums. If a husband assigns a policy for his benefit to his wife for hers, it may, just as any other assignment, be a fraud on his creditors; so if he surrenders a policy in his name and takes out one in hers, for this is really an assignment; so if he makes a large and unreasonable insurance in her favor when he is indebted, but even against creditors he may insure his life for her benefit for a reasonable amount. Statutes often exempt insurance policies from the claims of creditors.

Contracts and conveyances by a wife for the benefit of her husband's creditors are in reality in-

directly contracts and conveyances with him. But special considerations have arisen with reference to the wife's capacity to be surety for her husband and to the incidents of her suretyship.

(a) **Capacity Under General Powers.**—In the absence of express prohibition in the settlement or statute whence she derives her capacity to contract, a wife can to the full extent of that capacity, equitable or statutory, contract as surety for her husband. Thus, mortgages by the wife for the husband's debts are common, so are assignments of personalty; and a married woman who can make a promissory note can endorse one for her husband.

(b) **Capacity Limited by Statute.**—In some States statutes expressly, or by necessary implication, prohibit a wife's contracts as surety for her husband. But such is not the effect of statutes forbidding contracts between husband and wife, or providing that a wife's property shall not be liable for her husband's debts. Nor does a statute which prohibits such contracts as to her statutory separate property affect her capacity as to her equitable separate property.

(c) **Contract Otherwise Binding.**—The contract must, however, not only be one which, though a married woman, she has capacity to make, but also one which would bind her as surety if unmarried.

(d) **Implied Suretyship.**—Whenever a wife conveys or mortgages her property, or binds herself for her husband's debt she does so prima facie simply as his surety; but whether she is so or not depends upon her intent, and the debt may be shown to have really been hers. Nor is she a surety so far as concerns creditors if she is one of the original contractors and nothing else appears.

(e) **Incidents of her Suretyship.**—Whenever a wife is expressly or impliedly, as above, surety for her husband, she has the same rights as other sureties. Thus, she has her equity of exoneration. She may not only, if she has paid his debt, go against him for reimbursement pari passu with his other creditors, being subrogated to the rights of the creditor she has paid, but she may compel him or his representatives to redeem her goods which have been pledges for his debt. and after his death she or her representative or her creditor may have her property exonerated of its liability out of his real and personal estate. As in the case of other sureties she may compel the creditor to first exhaust the principal's means; if any of his securities are released, or his time is extended, or if he buys the debt, she is discharged. If her mortgaged estate is sold for her husband's debt under decree, she may have a decree over against him.

In a case which was decided by the Supreme Court of Massachusetts in 1888, a man in an insolvent condition upon entering into an engagement of marriage and with intent to defraud his creditors, orally promised his intended wife to give her certain bonds as a marriage settlement and subsequently before the marriage delivered the bonds to her upon an understanding that upon the consummation of the marriage they would become her absolute property; and the bonds remained in her possession until after they were married. The court held, that the transaction amounted to nothing more than an executory contract to transfer the bonds upon the marriage which was without valuable consideration and void as against his assignee in insolvency even if she did not participate in the fraud. It will readily be seen how imperative it is that a woman be professionally advised and

instructed with reference to the ante-nuptial agreement. In another case, in Massachusetts, a legal contract and promise of marriage made in good faith by a woman to one who had executed to her a deed of land for the purpose of inducing her to marry him the court held, that she would be entitled to hold the land against the man's creditors although the marriage was prevented by his death; the promise of marriage, made in good faith, furnishing a good consideration for the deed.

In another case, a man, in consideration of marriage, assigned to his intended wife all his right and interest in an annuity to have and to hold to her during the continuance of the marriage, and afterwards married her; it was held by the Massachusetts Supreme Court, that upon a divorce from the bonds of matrimony granted on her libel for his cruelty, her interest in the annuity ceased.

But in the absence of any express provision to that effect or an implication of such an intent from the whole instrument, a provision in an ante-nuptial agreement for the benefit of either of the parties is not annulled by a divorce although it was granted for his or her adultery.

It is fully conceded by the authorities that the ante-nuptial agreement without the intervention of the trustee, which is necessary in agreements for separation, is good and effectual. If an ante-nuptial agreement gives power to dispose of property by will, the power may be exercised by a will immediately executed, although prior to the marriage. The reason given for holding that marriage is deemed to be a revocation of a woman's will—that she thereby divests herself of the power of revoking it and destroys the ambulatory character necessary to the will,—does not apply to an appointment by will. The woman has the same authority to ex-

ecute the power of revocation and appointment when married as before. The nature, not the form of the instrument determines whether at common law or under statutes, it is a will of which marriage is a revocation.

By an ante-nuptial agreement made between a man and his intended wife, she was to hold her property to her sole and separate use and was to advance to the intended husband certain promissory notes owned by her, with the proceeds of which he was to redeem his mortgaged farm and convey half thereof to her and have the use of said half so long as he should be a faithful husband to her. He had no legal right to redeem said farm, the right to redeem it having wholly gone from him. They were subsequently married and the husband soon after took said notes from his wife without her consent and put them into the hands of his attorneys for collection for him. The wife petitioned the court to appoint a trustee to hold her separate property in trust for her and the court appointed such trustee to whom the wife conveyed all her separate property in trust. The trustee brought a bill in equity against the husband and his attorneys, praying that they might be required, by decree, to deliver said notes to him and might be restrained from prosecuting actions against the makers of the notes and from receiving any money due thereon. The court held that the trustee was entitled to a decree against the husband, declaring the trustee's title to the notes and the proceeds thereof, and also to a decree against the husband's attorneys, requiring them to account for and deliver over to the trustee the notes or the proceeds thereof on payment of their legal costs and expenses for services and disbursements.

An interesting case was decided by the Massachusetts Supreme Court in 1887 wherein it appeared that a woman's signature to an ante-nuptial contract was procured by fraud; she testifying that her intended husband had promised to give her five thousand dollars and a farm worth five thousand dollars; that he told her while she was reading the contract at his lawyer's office to "hurry up and sign it," as his horse would not stand; that she said, "I suppose it is just as you talked?" To which he replied, "Yes." And that she thereupon signed it knowing the contents only from what he had said. The provision for her not being what he had promised; and two other witnesses having testified,—one that the husband had told him that he promised to settle upon her ten thousand dollars of which the farm was to be a part, the other, that he was going to give her that sum in money and property equally; the court held, that her testimony would warrant a finding that she was induced to sign the contract, by a fraudulent misrepresentation of its contents and that the testimony of the other witnesses was admissible to confirm her evidence.

A woman may, after marriage, repudiate an ante-nuptial agreement entered into by her by the fraudulent representations of her intended husband as to its contents and no ratification of such a contract during her marriage will prevent her from exercising the right. If she entered into it without fraud or misrepresentation, however, and all of the necessary contractual elements existed and it has been fully performed on the husband's side, a court of equity will enforce its performance. She cannot repudiate its conditions if she has accepted its benefits.

The surviving husband of a woman, who in contemplation of marriage, made with him an ante-

nuptial agreement providing that in case she should die leaving issue surviving her, a certain note and mortgage should be held to the use of her intended husband for his life with remainder to her issue in fee simple and who has since died leaving issue surviving her, may maintain a bill of equity against one to whom she, in her last sickness, delivered the note and mortgage with directions to retain and hold them in trust for the purpose declared in the ante-nuptial contract and especially to protect the rights and interest of her children, to compel the delivery of the same either to himself or to such person as the court may appoint trustee. Death-bed repentance of her act executing an ante-nuptial agreement would be unavailing unless it could be shown that the husband had been dilatory in carrying out his part of the agreement without a sufficient reason therefor.

An ante-nuptial contract whereby a man agrees that real estate shall be transferred to his wife upon his decease, based on a meritorious consideration, though released or extinguished at law, is held good in equity and will be enforced by a court of equity against the heirs of the party in default. The Court will hear and determine such a case according to the course of proceedings in Chancery and will make such decree therein as justice and equity may require. The court will have regard to the intention to be deduced from the whole instrument of conveyance to a greater extent in construing trust estates created by ante-nuptial contracts than in the construction of like limitations in legal estates. The intention of the party is sought with as great eagerness as in the case of wills.

A settlement in trust of personal property completely executed without any circumstances tending to show mental incapacity, mistake, fraud

or undue influence is binding, and will be enforced against the settlor and his representatives and cannot be revoked except so far as a power of revocation has been reserved in the deed of settlement; and if by the terms of the deed the income of the property is to be applied by the trustee to the benefit of the settlor during his lifetime, the validity or effect of any further trusts declared in the instrument will not be impaired thereby.

A power of revocation should be reserved in the deed, otherwise it cannot be revoked no matter how many changes may have taken place since its execution which would seem to warrant setting it aside.

Any provision in the contract restraining alienation is against public policy and contrary to law. No condition whatever can give it life and validity and it is void against creditors.

If the wife becomes insane, a bill in equity lies to compel the trustee under an ante-nuptial agreement securing the income of property to the wife's sole and separate use to pay to her husband and guardian such portion of the income as is reasonable for her support.

An agreement by a woman on the eve of marriage, to pay the debt of her intended husband which is procured by threats of arresting him, cannot be enforced in equity.

An unmarried woman may make a will, and then an ante-nuptial agreement with her intended husband providing for her retention of full control over her property, and that the marriage shall not revoke her will, and it will not be revoked by her subsequent marriage, no issue having been born.

An ante-nuptial contract may be enforced by bill in equity against the trustee or any person into whose hands the property has come after the death

of either of the parties; but it will not be so enforced if the party seeking to enforce it has not fulfilled it on his or her part.

In a case where there is no trustee and a husband is violating an ante-nuptial contract, a court of equity will, upon the wife's application, appoint a trustee to enforce and protect her rights; and such a trustee may maintain a bill against the husband to compel fulfilment of the agreement.

A woman may bar herself by an ante-nuptial agreement of her distributive share or of her statutory allowance.

Ante-nuptial agreements must conform to the usual legal requirements of other kinds of contracts; if they are evidenced only by oral promises and fragments of letters they are insufficient, being within the statute of frauds which requires certain contracts to be in writing.

Certain statements made by a woman of wealth before marriage in letters to her betrothed to the effect that a portion of her property should be treated as joint property, are held not to constitute a ante-nuptial agreement entitling her husband to an interest in his wife's estate while they are living apart after a permanent separation.

A promise by a woman to marry immediately a man she has promised to marry at some indefinite future time, is a good consideration for an assignment to her, two weeks before marriage of all his interest in his father's estate. Such an assignment, however, is not an ante-nuptial contract; but if at the time of executing it the man was free from debt, except to the woman, and no real purpose to hinder or delay future creditors is shown, it is valid as against future creditors.

If a man and woman enter into an ante-nuptial contract by the terms of which, after their marriage

they are to retain their respective estates, with a provision that, if the wife survive the husband she shall receive within a given time from the time of his death, a certain sum of money from his estate; that to secure such payment she shall have possession of certain real estate of which he is seised, which shall become hers absolutely if the payment is not made within the time stated, and that upon his death she shall by deed release all interest in his estate excepting said stipulated sum and the security for the payment thereof; after their marriage and the death of the husband the wife will be required to release all her interest in her husband's estate upon the tender to her of the stipulated sum and a demand for said release.

The foregoing illustrations will give an adequate idea of the general characteristics, the utility and the subtlety of the ante-nuptial agreement. Every woman contemplating marriage should consult a lawyer of experience as to the construction, scope and effect of any such instrument which she may wish to take under consideration.

It should be borne in mind at all times, however, that a mere oral agreement to execute an ante-nuptial contract is of no force or effect, being within the statute of frauds, the main object of which was to take away the facilities for fraud and the temptation to perjury which arose in verbal obligations, and the substance of which has been enacted in almost all states of the Union with other provisions of the same general character to prevent frauds and perjuries.

As to the terms of an ante-nuptial contract, or just how and in what manner and proportions property is to be settled thereunder, the woman must be the sole judge, guided by the advice and

judgment of friends who are in every way qualified to advise her upon such a vitally important matter.

The status of woman after marriage is problematical to say the least, for the mind of man veers like the wind and frequently "bloweth where it listeth and thou hearest the sound thereof, but canst not tell whence it cometh and whither it goeth," and some men there are, and always will be, who prey upon the confiding nature of woman and her lack of legal knowledge. "These are murmurers, complainers, walking after their own lusts; and their mouth speaketh great swelling words having men's persons in admiration because of advantage."

An ante-nuptial contract has just been recorded in Rhode Island which shows that one woman knew how to protect her property and incidentally herself from the possible undue influence, importunities and threats of her intended husband: Miss —— inherited $12,000,000 from her grandmother and shortly thereafter married Lord ——. Previous to the marriage ceremony an ante-nuptial contract was arranged and executed transferring all the estate and property of the prospective bride to the control of two trustees, and providing that the income shall be paid to her until she becomes thirty-five years old. If she dies before reaching the age of thirty-five, her Lord is to be paid $100,000 for his absolute use. If children are left, Lord —— is to receive the income from $100,000 for the remainder of his life, and the children equal shares of the remaining estate after reaching the age of twenty-one. It will be noted that only in the event that Lady —— dies before reaching the age of thirty-five is her Lord to be paid anything. The trust fund would remain intact even then, and go to the children when they reached the age of twenty-one. The financial status,

at least of this woman, is permanently and decisively fixed. Should her "Lord and master" ever attempt to meddle or tamper with her property she might sportively quote the words of Second Samuel —"How are the mighty fallen in the midst of the battle! O Jonathan, thou wast slain in thine high places."

CHAPTER III.

PROMISES TO MARRY AND BREACH OF PROMISE

A contract mutually entered into by a man and a woman that they will marry each other, is commonly called a promise to marry. It is necessary that such a contract, either express or implied, precede a wedding ceremony, which, of course, cannot be agreed upon and performed simultaneously.

When such a contract has been made, and subsequently, either of the parties thereto refuses to marry thereunder, the other may bring a suit for damages; such suits are called breach of promise suits and when being tried, usually afford the social sensation of the day.

The contract is the mutual agreement of a man and a woman to become husband and wife in the future, and in form, must satisfy the legal requirements, as to parties, consideration, and other matters, to the same extent as contracts of other kinds.

The failure to carry out the terms of any kind of a contract is a breach of promise, but the expression has been limited colloquially to broken promises of marriage. There must be an offer of marriage or promise to marry by one of the parties made known to the other; a mere intention to marry, communicated to third persons out of the other person's presence, is no offer or promise at all. The offer need not be in writing unless it is one of a series of stipulations and counter-stipulations dependent upon each other, or is not to be

performed within one year; it may be made through a friend or agent and need not be made in express words; it need only appear that both parties understood it to be an offer of marriage. It is sufficient if there is shown a definite understanding between the parties, their friends and relations that their marriage is to take place, and this may be shown by conduct.

The acceptance, like the offer, may be made through a friend or agent and need not be in express words, but may be inferred from the promisee's conduct, and it must appear that it was made within a reasonable time after the offer. The accepted promise must be certain. Thus a promise to marry "perhaps" could not be the foundation of a suit, and a man's promise to marry a woman if he married anyone, is void, both because it is too indefinite and because it acts virtually as a restraint on marriage and is against public policy. A promise to marry after the death of a parent, the parent having died, has been held good, and a promise to marry a woman after she had had an operation performed, the operation not having been performed, has been held not binding. Conditions which are insignificant are sometimes disregarded, as where a man promised to marry plaintiff when certain carriages should be finished, and they were not finished. The court held such a limitation not of the essence of the contract and the man bound nevertheless.

But a man's promise, conditional upon his getting a divorce from his wife or upon her dying, is void; and so is a promise conditional upon the promisee's having intercourse with him or continuing to live for a time as his mistress, as such promises are contrary to public policy.

If the parties do not themselves make the contract definite as to time and place, the law presumes that a contract to marry is a promise to marry within a reasonable time, and at the residence of the woman. In determining what is a reasonable time, the age and circumstances of the parties will be considered.

The consideration in contracts of this kind is the mutual promise. There may be some other consideration added which will neither add to nor detract from the contract unless it be immoral. Thus a promise to marry made after seduction, in consequence thereof is binding, but a promise to marry on consideration of future intercourse is void, as against public policy.

The contract must be made between competent parties. Thus, an infant, not capable of making ordinary contracts, though he is old enough to marry, and though he accomplished seduction by his promise, is not bound by a promise of marriage, though as in the case of other contracts with infants, he may sue on the promise to him.

But in all cases where the party is legally competent to contract and knows of his incompetence to marry, he may be liable in an action for deceit, though his promise to marry be void. The fact that the party has already promised to marry one or more women will not affect his capacity to promise to marry yet another.

Force, fraudulent concealment and false representations may invalidate contracts to marry, just as they invalidate other contracts.

A promise made at the point of a pistol, or to get free from actual confinement, would not be enforceable. While a man is supposed to have inquired and learnt all about the fortune, condition, and circumstances of a woman before promising

to marry her, and while a woman is not bound to disclose anything except her previous unchastity or her unfitness for sexual intercourse (it would be a fraud to sell a cow with such a defect without making it known to the purchaser), any false representation made by her or on her behalf, with her knowledge, for the purpose of deceiving the promisor, constitutes a fraud, and in such cases a man's promise is not binding, whether such false representations relate to her social position and fortune or to her character.

Evidence that the plaintiff's brother kept a bawdy house, however, without in any way connecting the plaintiff with it, is inadmissible for the defendant.

It is not the duty of a party before making or accepting an offer of marriage to communicate all the previous circumstances of his or her life. The parties would be bound if they became engaged, without making any investigations, and without receiving any assurances or representations which led to the engagement, even though matters were discovered subsequently, which, if known at the time, would have prevented the engagement, unless they were such as gave a right to the other party to terminate the contract upon their discovery.

The fact that the woman had some negro blood in her veins, or that her motives were mercenary, or that there was a want of affection on her part or that there was an incompatibility resulting from disparity of age, difference of character and disposition, and other causes apart from fraud, will not justify the man, as a matter of law in breaking the contract. Mere silence on the part of the plaintiff, without inquiry by the defendant though resulting in the concealment of matters which would have prevented the engagement if known, will not constitute fraud.

But a partial and fragmentary disclosure accompanied by the willful concealment of material and qualifying facts, is a misrepresentation which will avoid a contract to marry subsequently made. More direct proof of a contract to marry is now commonly required than formerly. Therefore, a promise cannot be inferred from devoted attention, frequent visits and apparently exclusive attention; nor from mere presents or letters not to the point; nor from the plaintiff's wedding preparations unknown to the defendant, nor from the woman's unexplained possession of an engagement ring. Courtship alone, or, mere intention to marry is not enough. Courtship is not an agreement to marry. The fact that the plaintiff consented to a two year's postponement of the wedding day has been held not to relieve the defendant from his promise.

There is a breach of the contract to marry entitling the party, not in default, to sue for damages if a party refuses to marry on the day fixed, or when the promise was general, upon request, after a reasonable time refuses to fix a day, marries some other person, or repudiates his promise and declares that he will not be bound by it. In either of the last two mentioned cases the party not in default need not wait for the time of performance to arrive, or request the fulfilment of the promise, but may sue at once.

When a request is required in the case of a woman, the modest expression of her readiness to be married, in the presence of the man, is a sufficient request.

A refusal to fulfil the contract may as well be manifested by acts as by words. After the lapse of a reasonable time, if one party, without sufficient excuse, neglects or refuses to fulfil his promise, the other may consider this a breach and sue. It is

sufficient if plaintiff shows that defendant has violated his promise by refusing to marry her, without averring or proving an offer on her part to marry defendant.

An action for breach of promise exists independently of statute, by the common law, although at an early date in this country it was questioned whether such an action could be brought, and efforts have been made at various times to have it abolished. The action may be brought by either a man or a woman. It does not survive against a party's representatives unless there has been special damage.

When sued for breach of promise, the defendant may show either that, owing to the absence of some requisite, there never was any contract, or that, though such a contract did exist, he did not break it because he was discharged from his obligation, either by the plaintiff's express consent or by the plaintiff's consent to be implied by the jury from her conduct or by the plaintiff's failure to carry out some condition of the contract, or by the plaintiff's or even the defendant's having become physically or mentally unfit to marry after the promise was made, or by the plaintiff's having been dissolute, or guilty of such brutal or immoral conduct as shows her unfit to expect the defendant to marry her, though excessive drinking has been held not enough; and it is not a defence that after the promise the defendant discovered that he could not live happily with the plaintiff. It is doubtful if in any mind once set upon a breach of a promise to marry there could be any dearth of such discovery.

It is not a defence that she had promised to marry someone else before she agreed to marry him, or that he made her promise in bad faith, or that after he refused to marry her he offered to carry out

his contract. Certainly not if his second offer came after she had threatened or brought suit. If the defendant pleads the plaintiff's bad conduct as a discharge he must show that his refusal to consummate his promise was due to such bad conduct, and that he renounced his promise as soon as the conduct happened or was discovered by him. If he continues to bask in the radiant sunshine of her Cleopatric charms, he will be held to have slumbered fatally upon his legal rights. And dissolute conduct is no defence whatever, if he connived at or was a party to it. He must come into court with clean hands and absolutely free from any participation in the conduct complained of, or set up in defense.

In actions for breach of promise of marriage, damages have never been limited to the rules governing actions upon simple contracts for the payment of money, but rests with the sound discretion of the jury under the circumstance of each particular case, subject of course to the general restriction that a verdict influenced by prejudice, passion or corruption will not be allowed to stand. To keep cases of this kind out of the courts, exemplary damages may properly be awarded. The plaintiff is entitled to recover not only an indemnity for her pecuniary loss and the disappointment of her reasonable expectations of material and worldly advantage resulting from the intended marriage, but also compensation for wounded feelings, and the mortification and pain which she has been wrongfully made to undergo and for the harm that has been done to her prospects in life. Thus, there may be given in evidence, and the jury may take into consideration in estimating the damages, the defendant's general reputation for wealth (and in rebuttal poverty) and his social position.

It has been held in Arkansas, however, that the damages are not to be measured by the wealth or poverty of the defendant, though his wealth and rank may be pertinent to the issue as showing the injury sustained by the loss of marriage. Evidence may also be given and considered of the length of the engagement, the depth of plaintiff's devotion, her lack of independent means; her mortification and injured feelings and affections, her loss of virtue and reputation; but not her loss of time and the expenses of medical attendance; her altered social condition in relation to her home and family due to his conduct, and her expenses in preparation for the marriage. But no facts arising after suit brought may be proved.

In aggravation of damages it may be proved in some states, if this is alleged in the complaint, that by means of his promise, the defendant seduced her, and the results of the seduction, as the expenses attending the birth of a child, or the pain and mortification of bearing a bastard; in other states, on the ground that the plaintiff must have been a particeps criminis to the seduction, and therefore could not complain of it and the jury cannot consider it. In aggravation, also, may be shown the mode in which the engagement was broken, the cruel, indecent and insulting conduct of the defendant, and the fact that to justify his refusal he has pleaded the plaintiff's unchastity in bar, whether such plea was in bad faith or not; though in some states to enhance damages the plea of justification must have been made in bad faith, and in some it cannot be taken into consideration at all, and in mitigation of damages may be shown the fact of the plaintiff's unchastity, though known at the time of the promise or condoned, and her general bad character (good character in rebuttal), and the defendant's

bad character, or his being afflicted with a contagious or incurable disease, and any misconduct showing that the plaintiff would be an unfit companion in married life.

But not that since the commencement of the action the plaintiff has made declarations to the effect that she had no affection for the defendant and would not marry him but for his property. But such declarations made before the action were admitted, and not the fact that the plaintiff had been trying to marry someone else, or the probabilities of unhappiness resulting from the marriage, and not that the defendant had seduced the plaintiff or corrupted her morals, rendering her a less desirable person to marry. It is not to be endured that a man should seduce a female and ruin her character and standing in society, and, when she comes to ask compensation for the injury under which she is suffering, avail himself of her humiliation and disgrace to diminish her claim for damages.

In Wisconsin, marriage between first cousins being sanctioned by law, such kinship of the parties is not a defense, nor a matter in diminution of damages, in an action for breach of promise to marry.

There is no law and no inherent power in the courts to compel marriage. Any person may break a marriage engagement, but he must respond to the other party thereto in damages. It would be against public policy to compel two persons against their will to become man and wife. This sacred relation should be entered into in love and confidence, not with fear and hatred.

In England, specific performance of the contract of marriage was decreed by the spiritual court, compelling a celebration of the marriage, in facie ecclesiae in early times, but this remedy could not be pursued if a suit for damages was brought. The

last instance known of the bringing of a suit for specific performance was in 1752 and the right to bring such an action was abolished by Lord Hardwick's Act.

There is a tendency on the part of wronged women to shrink from the publicity and notoriety attending suits for breach of promise, and fear of being brought into public ridicule or scorn by idle gossipers likely to be found chiefly among her female acquaintances (miscalled friends), and sensational newspaper reports of the delicate details of the courtship, which must be disclosed at the trial. Such unwarranted timidity should be condemned. Men should be taught that woman's affection cannot be dealt with wantonly.

Women owe a threefold duty to mankind in general, to their sex in particular and to themselves more in particular, to bring such suits wherever the circumstances legally warrant it.

A Chief Justice of the Massachusetts Supreme Court has aptly and eloquently treated the subject in the following words:

"We can conceive of no more suitable ground of application to the tribunals of justice for compensation, than that of a violated promise to enter into a contract, on the faithful performance of which the interest of all civilized countries so essentially depends. When two parties, of suitable age to contract, agree to pledge their faith to each other, and thus withdraw themselves from that intercourse with society which might probably lead to a similar connection with another,—the affections being so far interested as to render a subsequent engagement not probable or desirable,—and one of the parties wantonly and capriciously refuses to execute the contract which is thus commenced, the injury may

be serious, and circumstances may often justify a claim of pecuniary indemnification.

"When the female is the injured party, there is generally more reason for a resort to the laws than when the man is the sufferer. Both have a right of action, but the jury will discriminate and apportion the damages according to the injury sustained. A deserted female, whose prospects in life may be materially affected by the treachery of the man to whom she has plighted her vows, will always receive from a jury the attention which her situation requires; and it is not disreputable for one, who may have to mourn for years over lost prospects and broken vows, to seek such compensation as the laws can give her. It is also for the public interest, that conduct tending to consign a virtuous woman to celibacy, should meet with that punishment which may prevent it from becoming common. That delicacy of the sex which, happily, in this country gives the man so much advantage over the woman, in the intercourse which leads to matrimonial engagements, requires for its protection and continuance the aid of the laws. When it shall be abused by the injustice of those who would take advantage of it, moral justice, as well as public policy, dictates the propriety of a legal indemnity.

"This is not a new doctrine. As early as the time of Lord Holt, it was announced, as the common law, by that wise and learned judge and his brethren, that a breach of promise of marriage was a meritorious cause of action; and although the value of a marriage in money might have had some influence in that decision, there is no doubt that the loss sustained in other respects—the wounded spirit, the unmerited disgrace, and the probable solitude, which would be the consequences of desertion after a long courtship—were considered to be as

legitimate claims for pecuniary compensation as the loss of reputation by slander, or the wounded pride in slight assaults and batteries.

"Nor is this English law become obsolete. It is the common law of our country, always recognized when occasions have offered; and the occasions have not been unfrequent since the adoption of our constitution."

The action of breach of promise was unknown to the Roman law, it being considered contra bonos mores. Even a stipulation fixing beforehand the sum to be paid as a penalty in case of non performance of the contract could not be enforced. The only penalty attached was the obligation on the party who had broken the contract to return any gifts received by way of earnest, and the infamy of such conduct and proceedings.

In Holland, he who has entered into espousals, according to the law of that country, may, at the suit of the other party, be compelled to fulfil his engagement, by imprisonment, seizing his goods, etc.; and if he still continue obstinate, the judge may, by his sentence, declare the marriage perfected, the consent given in the espousals being, in such case, brought down fictione juris to the date of the sentence.

By the custom of Scotland, all promises of marriage, whether private or more solemn, or contained in written contracts, may, in general, be resiled from, which proceeds from a close adherence to the rule matrimonia debent esse libera, and from the consideration of the fatal consequences which often attend forced marriages.

In Spain, a promise of future marriage is of such force that, by reason of it, the persons who are betrothed are bound to contract matrimony afterwards, and are prohibited to marry with an-

other; but the canonical and civil impediments, which hinder and dissolve marriages, hinder and dissolve espousals, and their causes are of ecclesiastical cognizance.

In Germany, promises of marriage made with certain formalities are actionable; but it seems the modern laws, having regard to the tenderness of the marriage ties and the injustice of constraint, have, in many places there, taken away the means of enforcing, by action, a promise to marry.

By the Frederickian code, compiled for the states of his majesty the king of Prussia, a promise to marry might be enforced by imprisonment and a very heavy fine.

By the code of Ferdinand for the kingdom of the Two Sicilies, a promise of marriage produced no civil obligation, unless made before an officer of state in the manner prescribed, in which case an action might be maintained for the recovery of damages in case of non-performance.

CHAPTER IV.

MARRIAGE

Our law considers marriage in no other light than as a civil contract; the holiness of the matrimonial state is left entirely to the ecclesiastical law, and such contract is good and valid if the parties were at the time of making it willing to contract, able to contract, and actually did contract in the proper forms and solemnities required by law. Moreover, it is a contract regulated and prescribed by law and endowed with civil consequences; by which a man and woman, capable of entering into such a contract, mutually engage with each other to live their whole lives together in the state of union which ought to exist between a husband and his wife. The act of marriage having been once accomplished the word comes afterwards to denote the relation itself. Marriage, therefore, is the legal status or condition of husbands and wives, just as infancy is the legal status of persons under age. The legal conditions of a marriage are precedent, continuing and subsequent. A marriage is legal when all these conditions exist or are performed; invalid when one or more of them is wanting. A marriage is legal when all the provisions of law relating thereto have been complied with; illegal when one or more of them has been omitted. A marriage, if legal, must be valid, but a valid marriage may not be legal. A void marriage is not a marriage at all; it is invalid and illegal. A voidable marriage is one which is valid until duly avoided, or void until duly

confirmed; thus it may be valid or invalid, and it is illegal. A prohibited marriage is a valid marriage in respect to which some one has done or omitted something, prohibited or commanded by law, sometimes under penalty; it is simply illegal.

After a valid marriage between them, man and woman are husband and wife, and their offspring are legitimate or legal children. This most beneficial institution of society, as it is termed by Kent, may, therefore, fall into three great divisions: the formation of marriage; the marriage state; and the dissolution of marriage.

The consummation of a marriage by coition is not necessary to its validity. Matrimonial cohabitation or matrimonial intercourse, as sometimes distinguished from it, is not required, and as we have already seen, it is against the policy of the law that the validity of the contract of marriage or its effect upon the status of the parties, should be in any way affected by their preliminary or collateral agreements. The status of the parties is fixed in law when the marriage contract is entered into in the manner prescribed by the statutes in relation to solemnization of marriages.

Any promise not to marry at all, or not to marry except after unreasonable time or upon unreasonable conditions, is against public policy and void. Contracts, or clauses in contracts, having a tendency to prevent the marriage of some person affected are frequently held to be void as against public policy; to try to prevent marriage having been called the blackest of political sins. The effect of the contract, or clause, may depend largely upon its form, whether it is a condition or a limitation, whether it is a condition subsequent or precedent, whether it is general or aimed at a particular marriage, whether it affects realty or personalty and

what provision it makes in case of its breach. The law upon these subjects cannot be said to be well settled. This is a subject that has been fruitful of discussion and indeed of conflicting decisions, causing the law to be in a state of change and uncertainty, but a settlor can always carry out his intentions by putting the condition in the form of a limitation. A condition against a particular marriage, if reasonable, is valid. But if it practically amounts to a general prohibition against marriage, it is treated as a general condition and is void.

A member of a society of Friends, by will, gave a legacy of the remainder, after a life interest to his niece during her single life and forever if her conduct should be orderly and she remain a member of the society of Friends. When the niece arrived at a marriageable age there were but five or six unmarried men of the society in the neighborhood in which she lived, and during the life estate she married a man not a member of the society. It was held that the condition was an unreasonable restraint upon marriage and void.

A condition precedent is valid. For example, —The testator gave a portion of his estate to his daughter Rachel on her attaining the age of twenty-eight years, or day of marriage, which must first happen, provided his daughter should marry with the approbation of his executors. Rachel married without the consent of the executors. It was decided that the above provision was a condition precedent, and as it was not complied with, the estate did not vest in Rachel.

An absolute condition subsequent is void. For example,—A deed conveying the sole property in trust for the sole and separate use of the feme covert, contained a provision that in case the husband should survive the wife, he and his assigns

should have the rents, issues and profits during his natural life, only to and for his own use and benefit provided he should continue unmarried after the death of his wife then living and from and immediately after his decease, then over. Held, that this proviso being a general restraint upon marriage by means of the condition subsequent, was void and the husband's life estate was not terminated by his second marriage.

A condition is valid as to personalty if there be a gift over, otherwise void. A condition subsequent is good as to real estate if the condition is not intended to prevent marriage, but to provide for the grantee until marriage.

It should be borne in mind that there are four essential elements to a marriage.

First: Each of the parties must have the capacity to marry the other. Thus a man may not be able to marry a certain woman either because he is not old enough to marry anyone, or because she is too nearly related to him or is not of the same color.

Second: The parties must mutually agree to be thenceforth husband and wife. No one can be married without his or her consent no matter how competent the parties may be or what formalities they go through.

Third: The parties must go through certain formalities, sometimes religious and sometimes civil. That is to say, the state, for the protection of the people, generally prescribes formalities and does not leave marriage to be formed as an ordinary partnership.

Fourth: The parties must become husband and wife in fact, must assume marriage rights, duties and obligations. In the famous Sharon divorce case which was tried recently in the courts of California,

no marriage was found because the parties had simply lived together as man and mistress.

In Massachusetts, from very early times, the requisites of a valid marriage have been regulated by statutes of the Colony, Province and Commonwealth; the canon law was never adopted; and it was never received here as common law that parties could by their own contract without the presence of an officiating clergyman or minister take each other as husband and wife and so marry themselves. This clearly appears in tracing the history of the legislation upon the subject; the whole of which whether repealed or unrepealed, is by a familiar rule, to be considered in ascertaining the intention of the Legislature.

The requisite of solemnization before a magistrate and other authorized persons is essential to constitute a valid marriage, which had been clearly implied in earlier statutes, and was distinctly expressed in the following Massachusetts statute of 1646: "As the ordinance of marriage is honorable amongst all, so should it be accordingly solemnized. It is, therefore, ordered by this court, on authority thereof, that no person whatsoever in this jurisdiction shall join any persons together in marriage, but the magistrate or such others as the general court or court of assistance shall authorize. In such places where no magistrate is near, persons shall not join themselves in marriage but before some magistrate or person authorized as aforesaid. Nor shall any magistrate join any persons together in marriage or suffer them to be joined together in marriage in their presence before the parties to be married have been published according to law."

The Massachusetts statute of 1786, chapter 3, manifested no intention to change the law in this respect; while it expressly repealed all former

laws relating to the solemnization of marriages, it substantially re-enacted many of their provisions. It also contained a new provision wherein marriages which had been or should be had and solemnized among Quakers or Friends in the manner and form used and practised in their societies, to be good and valid in law and requiring the clerk or keeper of the records of the meeting at which such marriage should be had and solemnized, to make return thereof.

This section, Chief Justice Parsons tells us, was enacted in consequence of the general opinion of lawyers that such marriages were void before.

Until the changes in the form of the statutes it has always been assumed in Massachusetts and in the state of Maine, which was originally a part thereof, that except in the single case of Quakers or Friends a marriage which is shown not to have been solemnized before any third person acting or believed by any of the parties to be acting as magistrate or minister, is not lawful or valid for any purpose.

The absence of one or more of the foregoing elements may not render the marriage invalid, and as a general rule, absence of any formality whatever and of any consummation of the marriage will not prevent the parties from being husband and wife as we have seen, whatever other results may be entailed upon them. For a marriage which is valid, may be invalid in certain respects, or it may be a prohibited or voidable marriage.

Sometimes the marriage is recognized but the parties are punished for marrying, or for marrying in the way pursued; as in Maryland, where a marriage without license or publication of banns is valid but the parties are fined $100.00 each. Sometimes the marriage will not be recognized but there is no

penalty; as in Massachusetts, where if a woman marries a second time when her husband has been absent and unheard of for seven years, if he be not dead at the time of the second marriage, it is void, but she is not punishable for bigamy; and to illustrate more fully the importance of these distinctions, the marriage of a minor without the consent of his parents, was in England under Lord Hardwick's Act, void; in Maryland, simply prohibited. A legal marriage is one with respect to which all the provisions of the law have been complied with; but there are many laws relating to marriages which may be disregarded without preventing the parties from becoming by the marriage, completely husband and wife. Thus a license to marry is usually required by law, but failure to secure a license will not prevent the parties from becoming husband and wife if they are in all other respects properly married. Any marriage contrary to law in any respect is in that respect illegal, and any marriage by which the parties have become completely husband and wife is valid.

A marriage per se and without any judgment or decree, invalid for all intents and purposes no matter in what proceeding or in what court the question arises, is called a void marriage. Thus, if a man, being already married, marries another woman, his marriage is invalid to all intents and purposes without any judgment or decree, whether in a proceeding between the parties to settle the question, or in a proceeding after his death in which his issue claim as legitimate. A marriage which is valid until avoided is called a voidable marriage.

A marriage may be valid to all intents and purposes unless and until duly avoided, when it becomes void ab initio. A marriage may be void for all intents and purposes unless and until duly con-

firmed when it becomes valid ab initio. To this class belong marriages which for incompleteness or unreality of consent are void as lacking the essentials of a contract; these are inchoate and complete rather than voidable marriages. In North Carolina, Alabama and Maryland, a marriage invalid for want of age may be avoided or confirmed with or without judicial proceedings.

It is, therefore, very important to have some means of determining to which class of marriages a given imperfect or illegal marriage belongs, and the matter being complicated, a lawyer should be consulted in all cases. Every woman may bear in mind, however, that in determining the validity of any marriage, it is necessary to decide first, by the laws of what state or country its validity is to be tested. The capacity of the parties is controlled, according to different views, by the law of the place of the parties' domicile, or of the place where the marriage ceremony is performed; and the necessity and sufficiency of the ceremonies and consummation by the law of the place where they are married.

The law as to consent is the same everywhere. The mental capacity necessary to enable a party to marry (or to confirm his marriage), according to well-settled law, is such as renders him capable of understanding the nature of the act and its consequences.

This is a true statement of the law, but in everyday domestic life as we see it, if an understanding of the consequences of matrimony is a true standard of judging mental capacity, two-thirds of all the married persons on the earth should be adjudged insane. Most persons about to marry fail to realize that matrimony is a duty and a discipline as well as a delight. The principle of reproduction stands next in importance to its elder born

correlative, self-preservation, and is equally a fundamental law of existence. It is the blessing which tempered with mercy the justice of expulsion from Paradise. It was impressed upon the human creation by a beneficent Providence, to multiply the images of himself, and thus to promote his own glory and the happiness of his creatures. Not man alone, but the whole animal and vegetable kingdom are under an imperious necessity to obey its mandates.

From the lord of the forest to the monster of the deep—from the sublety of the serpent to the innocence of the dove—from the elastic embrace of the mountain kalmia to the descending fructification of the lily of the plain, all nature bows submissively to this primeval law. Even the flowers which perfume the air with their fragrance, and decorate the forests and fields with their hues, are but curtains to the nuptial bed. The holy state of matrimony was ordained by Almighty God in Paradise, before the fall of man, signifying to us that mystical union which is between Christ and his Church, but lust, money and wealth are too often the moving causes that lead to matrimonial alliances, with Satan as the bell cow and to the tune of the "Devil's Dream."

The want of capacity to marry must exist at the time of marriage; paroxysms of insanity before the marriage or the development thereof afterwards, will not suffice. It would be a hard rule indeed that would permit a man who has married a woman who later in life becomes insane to put her away on account of her inexpressibly sad misfortune. It is to the credit of our common humanity that there cannot be found in all the range of judicial proceedings, a single case that held that insanity is or could be a cause for divorce.

The marriage of an insane person during a lucid interval, is, in the absence of statute, valid; but the burden of proof lies on the party alleging the lucid interval. A person attacked with delirium tremens may have a lucid interval and may contract a valid marriage during such lucid interval. Mere intoxication is not sufficient to render a marriage invalid; but if it has caused complete unconsciousness or madness, or has been produced by fraud, the marriage is void.

Deaf and dumb persons are not idiots in law and are, therefore, mentally competent to marry. The performance of the marriage ceremony and continued cohabitation " 'till death" with a person of unsound mind will not constitute a legal marriage or give claim to dower or curtesy in his or her estate.

Impotence is no impediment to marriage in the absence of ecclesiastical jurisdiction. Under the ecclesiastical law impotence rendered a marriage voidable and in most states there is some statutory provision rendering impotence an impediment to marriage or cause for divorce. No rule already laid down and statute declaring a marriage void for impotence would be held to render it voidable only as under the ecclesiastical law, and likewise statutes declaring impotence a cause for divorce will be construed to render it a cause for nullity.

The marriage of a man and woman related by blood or by marriage within certain named degrees may be under the criminal law incest, under the ecclesiastical law, voidable, or by express statute, void. This disability is based remotely on the laws (so called) of Moses as contained in the eighteenth chapter of Leviticus. Marriages defective for this cause are, as a general rule, valid unless duly avoided by a nullity suit. Local statutes should be consulted

in this as in all other matters of statutory law. Nowhere in this country is marriage with a deceased wife's sister invalid except in Virginia.

A slave cannot marry because he cannot make a valid contract, and because the duties of a slave are inconsistent with those of the husband or wife; also because a slave is property, and being property, has not the legal capacity to make a contract, and is not entitled to the rights or subjected to the liabilities incident thereto.

In many states the marriage of persons of different race, as whites and negroes, or whites and Indians, is forbidden and is made a crime (miscegenation), and the statute may also render such marriages void. Such statutes are constitutional and do not conflict with the fourteenth amendment, or civil rights bill.

Owing to the great intermingling of the races, it is often difficult to determine whether a person is a white or negro. This depends upon the term of the statute. A mulatto is not usually a negro, but is the child of a negro and a white person; not the child of a mulatto and a white person; and it is held by the Virginia Courts that where the negro must have one-fourth negro blood, one drop less than one-fourth will make him white.

A man cannot have at the same time two wives, or a woman two husbands; but one who has married once cannot marry again unless such first marriage is void, or voidable, and has been duly avoided; or, if valid, has been dissolved by death or divorce. Such a second marriage would be both invalid and illegal. To illustrate,—the marriage of a woman with a man whose wife by a former marriage is still living and undivorced, is void and her subsequent marriage with another is valid although her husband by such void marriage is liv-

ing; again, a woman on discovering she had married an impotent, could not, without having such marriage decreed void, marry anyone else.

In most of the states, statutes provide that where a party has been absent and unheard of or beyond the seas for five or seven years, the other party shall not be punishable for marrying again, but such statutes would not apply to cases where the party marries a second time knowing the absent party is living; nor do they render the second marriage valid if the first really existed, though in some states the statutes expressly state that a second marriage must be declared void and thus made voidable simply. In general, life is presumed to continue for seven years after the party has disappeared, but if a party supposing his wife dead marries within seven years and the wife is never heard of afterwards, it will generally be presumed not only that she is dead but that she died before he married again. If a second marriage is had, it is not voidable merely, even where a statute provides that it may be decreed null, but no decree is necessary, and it is void ab initio. Though a man marries never so often, he can have but one lawful wife living. So long as she is living and the marriage bond remain in full force, all his subsequent marriages whether meretricious, or founded in mistake and at the time supposed to be lawful, are utterly null and void.

No decree of divorce is necessary to annul such subsequent marriage, for it never had any legal existence. Such was clearly the common law. This is not altered by the fact that statutes provide for actions to annul such marriages. Courts will avoid, if possible, an attitude which would give a person two spouses at the same time.

In Massachusetts when a marriage is dissolved on account of the prior marriage of either party,

and it appears that the second marriage was contracted in good faith and with the full belief of the parties that the former husband or wife was dead, that fact should be stated in the decree of divorce or nullity; and the issue of the second marriage born or begotten before the commencement of the suit, shall be deemed to be the legitimate issue of the parent capable of contracting the marriage. In general, the innocence of one of the parties will make the second marriage none the less void though by the Spanish and civil law a woman who is deceived into a marriage with a married man has the rights of a wife and her children are legitimate.

In Spanish law, the consort who enters into matrimony in ignorance that her husband has a partner or wife living (or of other impediment to the marriage) is in law not only innocent of crime but has all the rights, incidents and privileges pertaining to lawful marriage; and these are continued as long as there is ignorance of the other or former marriage or other impediment to the second marriage; and in some states she has been allowed alimony.

In a New York case, A who had married B, married C at eleven o'clock the same day that he was divorced from B, the divorce from B not having been granted until 2 o'clock, but A and C having acted in good faith, the marriage was held valid.

When a party who is already married goes through the form of, or contracts a second marriage, he or she, or both parties, may be guilty of the crime of bigamy or polygamy. Section 5253 of the Revised Statutes of the United States, omitting its exceptions, is as follows: "Every person having a husband or wife living who marries another whether married or single, in the territory over which the United States have exclusive jurisdiction, is guilty

of bigamy and shall be punished by a fine of not more than $500.00 and by imprisonment for a term of not more than five years." Bigamy was not a felony at common law; indeed, according to that law, it was not a crime of which the ordinary common law tribunal took cognizance at all; it was originally considered of ecclesiastical cognizance exclusively. Whether the English statute of 1604 is in force in the United States is doubtful; it is in Maryland, but not in Pennsylvania. In prosecutions for bigamy, a marriage in fact must be proved and may be proved by cohabitation and the confessions of the party, but the testimony to justify conviction must be clear, strong and convincing. The indispensable evidence to support the prosecution for bigamy, is, that the defendant had a former husband or wife living; a subsisting, valid, prior marriage subjecting to its duties and conferring its rights. If, therefore, the first marriage is void, the offense has not been committed, but if it is merely voidable, contracted under disabilities or impediments which render it capable of confirmation or avoidance, as the party may elect, it is a marriage in fact until avoided, and the second marriage while it remains a marriage in fact, is criminal. Ignorance of the fact of the other's marriage may excuse the unmarried party, but, as a rule, ignorantia legis neminem excusat. A decree nisi does not dissolve a marriage, and the parties cannot marry again until it has been made absolute. In Massachusetts a decree of divorce nisi under the statute of 1867 was granted, which by its terms, was to be made absolute on notice after six months publication "unless sufficient cause to the contrary appear." Within six months the libellant, believing that he had obtained a divorce and was at liberty to marry again, married another woman and had sexual intercourse with

her. It was held that the second marriage was illegal and void and the libellant was not entitled to have the decree of divorce made absolute. If there has been any appeal from a decree of divorce and the appeal is sustained, an intervening marriage of either party would be void, and so would a marriage solemnized on the day before the entry of the decree absolute of a decree nisi in favor of one of the parties. An absolute divorce dissolves the relation of husband and wife, and all rights and obligations dependent upon the existence of the marriage relation are extinguished. The parties are no longer husband and wife but are permitted to marry at pleasure.

A limited divorce, or a divorce a mensa et thoro, does not dissolve the relation of husband and wife and neither can marry again, but such second marriage, though invalid, does not constitute bigamy. A prohibition against a marriage after a divorce of (generally only) the guilty party for a certain time, or except on certain conditions, is sometimes contained in a statute, as in New York, and is sometimes entered by a court as a part of the decree of divorce under the authority of the statute, as in Maryland, although in the latter state it is now very unusual for such a prohibition to be put into the decree. But no such prohibition, by a court, is valid unless it is authorized by statute. There is no authority in the court to impose any restraint upon a second marriage when a dissolution from the bonds of matrimony is adjudged. It is usually said that a divorce valid where granted is valid everywhere, but such a rule is neither strictly correct nor of much assistance. The validity of the divorce may be limited to a state where it is granted, if granted in a mode which neither law nor comity requires other states to recognize; or it may extend

throughout the United States if granted in one of the states by virtue of the "full faith and credit" clause of the constitution; or it may extend everywhere by comity and international law. A divorce may be valid as to one party and not as to the other, and it may destroy the marriage status and yet not affect certain property or personal right of the parties. The following general rules may be stated:

(1) A divorce granted by a divorce court in due conformity with the law of such court is valid in the state where it is granted.

(2) Such a divorce, if both parties are domiciled in such state, or if only one of them is so domiciled and the other is duly served with process in such state or voluntarily appears in the suit, is valid throughout the United States by virtue of the United States Constitution and practically everywhere by the principles of international law.

(3) Such a divorce, if only one of the parties is domiciled in such state, and the other, though not duly served with process, had an actual notice of the suit and an opportunity to defend it, would probably be held valid everywhere by comity as no injustice would be done.

(4) Such a divorce, if only one of the parties is domiciled in such state, and the other has no actual notice at all of the suit, but a mere notice by publication, would probably be held valid in such other states, and by their legislators or courts which have adopted the policy or recognize the justice of divorce granted on constructive notice, but not such other states as have not adopted such policy but regard it as contrary to natural justice except so far as this is necessary under the United States Constitution. That is to say,—except as to the status of the party domiciled and the property situate in the state where the divorce was granted.

(5) Such a divorce, if neither of the parties were domiciled in the state granting the divorce, has no extra-territorial validity although both parties submitted themselves to the jurisdiction of the court.

These rules, however, have not taken the effect of fraud into consideration. A statute providing in general terms that the guilty party shall not marry after divorce applies only to divorces granted within the state. But whether the prohibition has any effect out of the state in which the divorce is granted has been much disputed. In most states such a prohibition is regarded as a penalty. In Massachusetts it has been held that a person against whom a divorce has been obtained for adultery in another state by the law of which in such a case both parties may marry again, may contract a valid marriage in this Commonwealth. A New Yorker, prohibited by the New York court, has but to step into New Jersey to marry and the New York courts will hold the marriage valid.

Mutual consent is the very essence of the marriage, and parties cannot become husband and wife without it. A mere marriage ceremony cannot make a man and woman husband and wife as we have seen; to illustrate,—a marriage ceremony though actually and legally performed when it was in jest and not intended to be a contract of marriage, and it was so understood at the time by both parties and is so considered and treated by them, is not a contract of marriage. Intention is necessary as in every other contract; or, if they go through the forms of marriage supposing them to be preliminaries, it is no marriage; nor can sexual intercourse make a marriage, the parties knowing or intending it to be unlawful. It is indispensable to marriage whether under the statute or at common law that

the parties consent to be husband and wife, presently, and though cohabitation following an engagement is evidence of such consent, it is not conclusive but only prima facie evidence of it and as such open to rebuttal by contra-proof, though at the time of the marriage ceremony or consummation mutual consent is wanting because one of the parties is mentally incompetent, or is not real because of error, fraud or duress, and the marriage is therefore void. The necessary consent may be subsequently given when the party becomes sane, or later regains his freedom or discovers the deception or mistake, and the marriage may thus be confirmed. Consent may be absent owing to error, fraud or duress.

The mistake of person, but nothing else, affects the validity of the marriage. Thus, if a man and woman go through a marriage ceremony in masquerade, one supposing the other to be some one else, it is no marriage; although novelists and dramatists give validity to marriage in masquerade where the parties were entirely mistaken as to the person with whom they are united.

If a rogue, by pretending to be a known respectable man and assuming his name induced a woman to go through the ceremony of marriage, there would be no marriage, though this as all other mistakes induced by the other party, belongs rather to the subject of fraud. Mistakes of character, fortune, and health make no difference, for the parties take each other for better or for worse. Nothing could be more dangerous than to allow those who have agreed to take each other in these terms to be permitted to say that one of the parties is worse than expected. Deceit or false representations which induce consent, especially where the deceived party is weak in mind or young and more certainly if there

has been no consummation, will invalidate a marriage.

In a Michigan case, an old man who had lost his eyesight and was more or less deaf and otherwise broken, was put under the influence of liquor and drugs and induced to marry a woman he had no affection for, but who wanted his money. The marriage was annulled. A girl of fifteen was inveigled into marriage by her father's coachman who obtained both her consent and the celebration of the marriage by falsehood and fraud, and where she repudiated the marriage before consummation. It was held void. So also where a man induced a woman to go through a regular marriage service pretending it to be a mere betrothal; so where a felon by assuming a false name and character induces a woman to marry him and she repudiates the marriage before consummation; so, where a party is physically incompetent and conceals the fact; or a woman who is pregnant by another man conceals it; but it is not fraud if the pregnancy is by the man whom she marries, nor if he has been put on his guard as to her virtue by ante-nuptial connection with her. On the other hand, mere ante-nuptial unchastity, concealed, is no fraud except by statute, nor are false representations as to character, health or fortune, nor false pretenses of affection, nor marrying to escape punishment with the intention to immediately desert. Nor the mere assumption of a false name. A conspiracy by which one of the parties with the help of others, brings about a marriage for an ulterior object, may be in this sense fraud, but the fraud must be upon one of the parties. Third parties cannot complain. No more startling or absurd proposition can be conceived than that a marriage legal in form, acquiesced in and held obligatory by the parties, and recognized as valid

by law, might be annulled at the insistence of a third person, for any cause whatever.

If a party marries under duress the marriage is invalid. It would seem to require no argument to show that a consent given under actual duress, obtained by force, is no consent; and although the form of marriage has been observed, the essence of the contract is wanting. It would not suffice that he married unwillingly; he must have been forced by fear of bodily harm, but it is not duress when a man marries a woman after seducing her, to avoid a legal prosecution. Marriage contracted through fear of imprisonment is not void, when the fear was not imposed as an inducement to the marriage, but arose from the arrest and prosecution of the party for bastardy. Duress cannot be predicated of compulsion to discharge a legal duty. To illustrate:—A promises to pay B one hundred dollars and failing to keep his promises B sues him for breach thereof and compels him to pay. That is compulsion but it is not duress. A valid marriage contract may be expressed in words, written or oral, or in signs, or it may be implied from conduct. Letters are often evidence of a contract, but it is doubtful whether parties can actually marry by letter, by telephone or by proxy. Marriages by proxy have taken place at various times in history, generally between members of royal families of different countries, but in this country a more strict adherence to certain fixed rules of law is required. The contract must be, in substance, to be husband and wife under the law.

If the object of the parties be the assumption of the legal status of marriage, an agreement to live together for life may suffice, provided it creates the union of one man and one woman "so long as they both shall live," to the exclusion of all others, by an obligation which, during that time, the parties

cannot of their own volition and act dissolve, but which can be dissolved only by the state. Nothing short of this is marriage, nor will an agreement for a conjugal union such as their consciences and religion sanction suffice, nor for cohabitation as long as they can agree. If legal marriage is their object, any stipulations inconsistent with the law are simply void. The apparent contract is not affected by a secret reservation of one of the parties. After taking a woman as his wife, she deeming herself such, a man will not be permitted to say he meant only to take her as his mistress. But if both parties have or know of an ulterior object, which alone is meant to be secured by an apparent contract, there is no marriage; as where a man wrote a letter to a woman he had seduced, acknowledging her as his wife, it being their sole object to gain admission for her to a lying-in hospital, or to avoid another alliance by pretending to be married.

The contract may be intended to take effect at once or in the future; but it must be to be husband and wife thenceforth; it must contemplate the present assumption of the marriage status. Thus: —"This is your wedding ring, we are married," followed by cohabitation, may be a good marriage contract. It is not sufficient on the other hand, to agree to present cohabitation, and a future regular marriage when more convenient, or when a wife dies, or when a ceremony can be performed; nor can, "I will marry you in six weeks if you will sleep with me tonight," be anything more than a promise to marry. To this rule there is one exception. In one case, a contract looking to a future assumption of the marriage status is sufficient. In states where no marriage celebration is necessary, and when such contract is followed by sexual intercourse between the parties, the law, so as not to presume fornica-

tion presumes that parties who have promised to marry mean sexual intercourse, following such promise, to be the consummation of such agreement. This has been held in Missouri; but this presumption may be rebutted by any facts which show that the parties knew or intended their intercourse to be illicit, as where, at the time, they were looking forward to being married with a ceremony.

In many states no ceremony of any kind is essential to a valid marriage, and in such states a contract between parties competent to marry constitutes marriage, known, as the case may be, as marriage per verba de praesenti, or as marriage per verba de futuro cum copula. In states where a celebration is necessary this contract must exist at the time of such ceremony or afterwards.

All states have statutes providing for the celebration of marriages; what permission must be gotten or notice given before the marriage; who must perform the marriage ceremony and what record of it must be made. But generally such provisions do not affect the validity but only the legality of the marriage. Whether or not any of such provisions must be complied with to render the marriage valid depends:

(1) Upon whether by the pre-existing common or unwritten law, any such formality were necessary.

(2) Whether, if it were not, there is a provision in the statutes stating that non-compliance with it shall render a marriage void; and it is a general rule that no celebration of marriage is necessary at all except in states in which it is held that a celebration was necessary at common law, and in states where the statute, as in Kentucky, contains words of nullity.

No celebration is necessary by the law of nature, or by the canon law prior to the Council of Trent, or by the civil law, or by the law of Scotland. In England, after much hesitation, it is settled that it is, and this view has been sustained in Maryland, Massachusetts and North Carolina; but the contrary has been held in Tennessee, and by the Supreme Court of the United States, and in Alabama, California, Georgia, Illinois, Iowa, Kentucky, Michigan, Minnesota, Mississippi, Missouri, New York, Ohio, Rhode Island and Pennsylvania, and the English decision has been disapproved in Canada. One was necessary under the Mexican law, if there ever was any Mexican Law.

The necessity of the celebration depends upon the law of the place where the parties enter into the contract which is essential to a valid marriage. Thus, if the parties desire to marry in Maryland they must not only have a celebration but a religious one, i. e. to constitute a valid marriage under the laws of that state some religious ceremony must be super-added to the civil contract. If, on the other hand, the Marylanders desire to avoid this, they need only to step over the line into Pennsylvania.

Supposing some ceremony to be necessary, it is another question to determine what portion of the various ceremonies may be omitted. For the ceremony or celebration of marriage includes not only the act of a civil or religious officer declaring the parties to be husband and wife, but the prerequisite authority for such act, and the duties resulting therefrom; not only the ceremony proper, but the consent of parents, or license (consent of the state), or banns (consent of the church) and the registry of the fact that the marriage has been celebrated.

Consent of parents, license, publication of banns, registry of the marriage, though all or some of them are everywhere necessary to the legality of the marriage, are nowhere, under English or American law, necessary to the validity thereof; they were not so by the pre-existing law, and no statute has made them so. Parents consent is a mere matter of form, and generally not necessary, under the statutes, to the validity of a minor's marriage. We have seen that most of the states hold that compliance with the requirements of statutes is not necessary to the validity of the marriage. To constitute a valid marriage by the common law of England it must have been celebrated in the presence of a clergyman in holy orders; the fact that the bridegroom is himself a clergyman in holy orders, there being no other clergyman present, will not make the marriage valid, and there could have been no valid marriage in England before the reformation without the presence of a priest, Episcopally ordained. The principles of freedom of thought, "new thought" and statutes have extended the right to celebrate marriages to ministers of any church, and in most states, to judges, chancellors and magistrates; and special provisions have been made for Quakers. If the minister or judge, etc., were so de facto and the parties have acted in good faith, the marriage is good, though he were not minister, or judge, de jure.

As we have seen, parties cannot marry themselves with a ceremony when a celebration is required; there must be a celebrant. The celebrant must be a third party; a minister cannot marry himself. He must not only be present, but must be there as the celebrant of the marriage. The celebrant need only take notice that the parties are before him to be married, and pronounce them hus-

band and wife. Thus, at a marriage by an Episcopal clergyman, the direction contained in the Rubric respecting the opening address to the congregation, the adjuration to the persons about to be married as to confessing any lawful impediment to their union, and the putting on of the ring, are not absolutely essential to the validity of the marriage; the essential part of the service is the reciprocal taking each other for wedded wife and wedded husband. In the case of the religious celebration, the man and woman need not belong to that religion; thus, Protestants may be married by a Roman Catholic priest. A marriage celebration will have no effect if the parties are not at the time competent to marry; nor will it, if they do not intend to marry, though their consent may be presumed from their going through the ceremony, and to negative the presumption the absence of consent must be clearly shown. It is only where no celebration is had that a consummation is ever required, but from a consummation a celebration is often presumed.

The consummation of marriage may be either subsequent sexual intercourse between the parties or the assumption of the rights, duties and obligations of husband and wife, from which such intercourse may be implied. There are two principal ends of marriage—a lawful indulgence of the passions to prevent licentiousness, and the procreation of children under the shield and sanction of the law. If the parties know their intercourse to be contrary to law, even though it is sanctioned by their religion, it cannot be an element of marriage, but is mere fornication.

The question whether or not a valid marriage has been formed between a man and a woman may be relevant in any suit, before any tribunal, between the parties; and whether or not the evidence ad-

duced establishes a marriage must be judicially determined on proof, or this question may be the issue in a suit instituted in a particular tribunal by one of the parties against the other, or by some third party against them both for the express purpose of determining the validity of an alleged marriage between them; and whether or not there has been a valid marriage is judicially determined by a decree.

In proving marriage, four different presumptions may be brought into play:—

(1) The general presumption in favor of marriage;

(2) That of innocence;

(3) That of life; and

(4) That of the due performance of their duties by public officers. All of these presumptions are rebuttable. It is doubtful whether they will all act in favor of third parties;—for instance, creditors.

It is not necessary for a party alleging a marriage to prove, in order to make out a prima facie case, the separate existence of each of the essentials, for marriage is favored in law. Thus, if the celebration of a marriage be proved, the contract, the capacity of the parties, in fact, the validity of the marriage is presumed. So, if the contract be proved, the capacity of the parties is presumed. To illustrate,—A husband left his home in Mississippi, October 30, 1900, and went to Louisiana on business, where he was last heard from by letter to his wife, dated November 30, 1900, announcing that he was then sick in bed, and would return as soon as he was able to travel. He was habitually delicate in health, and his domestic relations had always been most agreeable. It was the belief of his family that he was dead, and in January, 1905, his wife married again. The absent husband was never

heard of alive. Under the circumstances the absent husband must be presumed dead, and the second marriage valid.

The presumption of innocence sometimes gives right to the presumption of marriage. A man and woman cohabiting without being married are guilty of fornification; so when such co-habitation is under color and claim of marriage, a marriage is often presumed; but such presumption is to save the innocence of the parties, and will not arise if it will leave or involve one of them in guilt,—as if a man is so cohabiting with two women, or if one of the parties is proved to be married to some one else. So, sometimes, if a second marriage is proved, a previous divorce of the first one may be presumed, though in general a divorce can be proved only by the record; so death may, in such case, be presumed.

A party is, independently of statute, presumed alive for seven years after he is last heard of. After seven years he is presumed dead. But when he is presumed to be dead there is no presumption as to the precise time of his death. This must be determined by the court from all the facts in the case; but in marriage cases the presumption of life often conflicts with that of innocence, as where a husband, believing his wife dead, but having heard from her within seven years, marries again. In such cases the two presumptions neutralize each other, and the court (judge or jury) decides as a matter of fact whether or not at the time of the second marriage the first was dissolved by death. The leaning, however, is generally towards the presumption of innocence. That the celebrant, as a public officer, has done his duty, is presumed; thus,—if a marriage celebration be proved, it is presumed that the celebrant was duty authorized, that the proper prelim-

inaries, as procuring a license, had been complied with; that the place and the forms used were legal.

In general, the proof of the marriage may be direct or indirect; evidence may be given of the fact that competent parties have contracted marriage with proper celebration and consummation, or of the fact that they have lived together as husband and wife, and have generally been reputed as such. In some cases either kind of evidence will suffice; in some, direct evidence is necessary. In a question of a marriage vel non, the issue is the existence of the essentials of a valid marriage; if the celebration of a marriage is proved, the validity of the marriage, the contract and capacity of parties, is presumed as already shown; if the contract of a marriage is proved, if no celebration is necessary, the validity of the marriage, and the capacity of the parties are likewise presumed. So that, the celebration of the contract may be the real issue. A contract without a celebration is, of course, no evidence of the celebration, but it is sometimes deemed so; in such cases the marriage is said to be proved by indirect evidence. The fact of the celebration is generally proved by the record thereof, or by witnesses present. The latter is considered stronger evidence, but it is not necessary under the rule for the best evidence to produce the record or the celebrant, unless, perhaps, the other evidence is purely circumstantial. The fact of the contract is generally proved by cohabitation and repute, hereafter discussed. The distinction generally made between proof of the fact of marriage and proof of the fact of matrimonial cohabitation, applies properly only to cases when a celebration is necessary to the validity of the marriage, or is made an issue in the case.

When the law requires a marriage to be

recorded, such record or the proper copy thereof, is direct evidence of the marriage, in criminal and civil cases alike. On a prosecution for bigamy, the marriage may be shown by a certified copy of the marriage certificate, without an infringement of the constitutional right of the accused to meet his witnesses face to face. But such record proves only what is required to be recorded, and is not conclusive. Such evidence, too, are certificates given by the celebrant to the parties, though this has been denied; but the delivery and custody of such certificate must be proven. This rule is simply in accord with the general rules of evidence relating to the production and authentication of writings. So private records kept by a clergyman, certainly after his death; so entries in a family bible; so foreign records, if this is consistent with the law of the forum. But in such cases the identity of the parties must always be shown, though after lapse of time slight evidence thereof will suffice. A valid decree of divorce is, of course, evidence of a marriage; there cannot be a divorce unless there has been a marriage.

Any person present at the marriage may testify thereto, whether a third party or the celebrant, and in general even parties themselves. Such witnesses need not be able to testify to the sufficiency of the celebration; that is presumed until the contrary is shown. The celebrant may testify to his own qualifications. And, in general, it is sufficient to show that he was in the habit of acting in this capacity, or that he held himself out as qualified in the particular case. Upon a trial for bigamy evidence that the person by whom a marriage ceremony was performed was reputed to be and that he acted as the magistrate or minister is admissible, and is sufficient prima facie proof of his official or

ministerial character. In pedigree cases, members of the family may testify that a marriage was reputed in the family to have taken place. Reputation or hearsay is admissible in all matters of pedigree; and so the repeated declarations of the father that he had married and by the marriage had two children, naming them; his recognition of them as his legitimate children, their recognition of him as their father, and of each other as brother and sister; and the fact that the marriage and legitimacy of the children were spoken of and known in the family are sufficient to prove the marriage of the father and the legitimacy of the children.

By the common law, families were, by intermarriage, incapacitated from testifying for or against each other. The common law excluded the husband and the wife as a witness in any case, civil or criminal, in which either was a party. The principle of the rule required its application to all cases in which the interests of husband or wife were involved. Therefore, the wife is not a competent witness against any co-defendant tried with her husband, though it be not directly given against him. Thus, a man being prosecuted for bigamy, his real (first) wife could not prove their marriage. But the husband or wife could prove the marriage in a case affecting neither of them. Statutes have, in many states, abolished this incapacity, entirely or in part. But a statute abolishing incapacity from interest does not affect incapacity from marriage. Even by the common law, if no marriage exists, there can be no incapacity from marriage; therefore, parties can prove that an alleged marriage between them was no marriage, unless estopped, or unless there is sufficient evidence before the court to establish a prima facie marriage. Thus, in a prosecution for bigamy the prisoner's real wife cannot

testify against him, but his second wife can. She is not a wife at all; hence, the reasons which would prevent do not exist. Under the Maryland statute a party cannot prove the marriage after the other party's death; but can by Pennsylvania law. In criminal prosecutions, as for bigamy or adultery, the prisoner's confession of his marriage is sufficient proof of it. In civil suits, the declarations and admissions of the husband and wife are generally admissible to prove their marriage; in the case of the husband, being admissions against interest; and in any case, being part of the res gestae of cohabitation and repute.

When a marriage is proved by the fact that the parties had lived together and were reputed to be husband and wife, it is said to be proved by cohabitation and repute. The facts that parties have publicly acknowledged each other as husband and wife, have assumed marriage rights, duties and obligations, have been generally reputed in the place of their residence to be husband and wife, are relevant to prove a contract of marriage between them, and consequently, in cases where no celebration is necessary, a valid marriage. In an early Massachusetts case it was held that evidence that a woman occupied the same bed with the defendant in a tenement and was seen getting dinner and doing other household duties there in his absence was competent to prove her to be his wife. But in cases where a celebration is necessary, evidence of a contract only, is not relevant to prove the celebration; still, if the parties have cohabited, such evidence may be, in certain cases, deemed relevant, on the presumption already discussed, that such cohabitation was lawful. Cohabitation and repute may thus be direct or indirect evidence of a valid marriage; it is in neither case more than prima facie

evidence, and may be rebutted by showing absence of the essential contract or capacity; whether it is so rebutted or not being left to the court or jury to determine from all the facts. As generally stated, where parties live together ostensibly as man and wife, demeaning themselves towards each other as such, and are received into society and treated by their friends and relations as having and being entitled to that status, the law will, in favor of morality and decency, presume they have been legally married. Such presumption is generally rebutted by showing that the parties intended their connection to be illicit, or that there was an impediment to their marriage. If, when the connection began, it was intended to be illicit, this intention is presumed to continue, unless evidence is produced of a change of mind. If, when the connection began, the parties desired or intended marriage, but an impediment existed, and this desire or intention is shown to have continued after the impediment was removed, and if, at such later time, the parties cohabited, even temporarily, in a place where marriage without celebration is valid, their marriage is proved; and, if they were in a place where a celebration was necessary, upon slight additional evidence, a new celebration will be presumed; at all events, the jury may decide in cases where proof by cohabitation and repute is proper, whether or not there was at any time a valid marriage. The weight of such evidence must depend upon the circumstances of each particular case.

In all cases, except when a celebration is alleged, as hereafter shown, in which no celebration is necessary to the validity of the marriage, the marriage may be proved by cohabitation and repute. In all cases, except those mentioned hereafter, though a celebration is necessary to the validity of

the marriage, it may be proved by cohabitation and repute. Thus, this is sufficient to prove marriage in actions by the widow for her dower, or marriage rights, or for the death of her husband; by an heir; by the husband and wife, as, of detinue, or ejectment; or against the husband and wife; or by the husband for slander of his wife; or against the husband for a debt of his wife; in actions for necessaries; in cases of legitimacy; in suits for alimony; and in divorce cases.

In all cases in which a party alleges that a marriage was celebrated at a particular time and place, he must prove that it was so celebrated at that time and place, and cannot prove cohabitation and repute to raise a presumption of a marriage at some other time and place.

In all cases (if a celebration is necessary to the validity of the marriage) when proof of a marriage would render one of the parties criminally liable, as in prosecutions for bigamy, adultery, or incest, and in actions for criminal conversation, the celebration must be proved. In such cases cohabitation and repute is not evidence.

In setting up a marriage which took place in another country or state, it is usual to prove first the common law, then a marriage by contract or by celebration, as required thereby. If the fact of a celebration is proved, it is presumed in conformance with the common law, though that the special requirements of such law must be shown to have been complied with, has been sometimes held. If no foreign law be proved, there is a presumption that it recognizes as a valid marriage any cohabitation of competent parties with matrimonial consent. And courts will not presume the existence of marriage laws differing from those of the forum. A foreign marriage may also be proved by proper

copies of the records. The more difficult the proof, the less will be the strictness of the court.

In some of the states a statute provides for the proof of marriage; thus, in Massachusetts where the record of cohabitation and repute is evidence of a marriage in any case; so in Minnesota. But the California statute seems simply declaratory of the law heretofore stated.

A suit brought for the purpose of having a void marriage judicially declared to be void, or of having a voidable marriage judicially made void is called a nullity suit. These suits are frequently called divorce suits in statutes and decisions, and there seems to be precedent for so calling them, but properly a divorce suit is a suit for the purpose of dissolving a marriage and the consequences of a divorce are very different from those of a decree of nullity, as the latter does not only destroy marriage rights, but declares they never existed.

A suit which may partake of the nature of a nullity suit, but which in modern times is very rare, is the suit of jactitation of marriage. This is where a party whether a man or a woman, complains in the ecclesiastical courts that another party falsely, maliciously and without authority, boasts that they are married. There are three defences; (1) denial of the boasting; (2) allegation of a marriage justifying it; (3) or of authority to assert the marriage. These suits are unknown in the United States, there being no ecclesiastical courts.

As already stated, there are two kinds of nullity suits; one, in cases where the marriage is void or is voidable without decree, and the decree is declaratory only; the other, in cases where the marriage is voidable and requires a decree to render it void. The two suits are distinct as to jurisdiction,

procedure and causes, and the distinction must be carefully maintained.

A marriage which is void per se ab initio, may, by judicial decree, be declared void; such are marriages void for want of capacity or celebration. Likewise a marriage which is voidable by the parties; such are marriages voidable for lunacy, or want of consent; for fraud, error or duress. In such cases courts of equity, in the exercise of their ordinary jurisdiction, independently of any provision of the divorce law may pass such a decree. Other courts, by special provision, such as divorce courts, may pass such a decree. In general, either party may complain; but one cannot allege his own fraud or duress; nor can one allege want of consent if he has ratified the marriage.

A lunatic may apply, if he recovers his mind; otherwise his guardian applies. A sane party who has married a lunatic in ignorance and good faith may also complain. Perhaps, even after the death of the parties, a decree could be obtained on the application of anyone interested.

Statutes sometimes provide for all the proceedings in these cases.

The decree in this class of nullity suits is simply declaratory; it declares, it does not make, the marriage void; it is a judicial determination of the status of the parties, and though perhaps not binding on persons not parties to the suit, it practically settles the question of the validity or invalidity of the marriage. Of course it settles the existence or nonexistence of any personal or property marriage rights.

Jurisdiction in the United States to declare void a marriage otherwise valid, as is the case with jurisdiction to grant a divorce, depends entirely upon the statute. In England the ecclesiastical

courts alone granted divorces and declared marriages void for the canonical impediments of impotence and consanguinity and affinity, and as no courts in the United States have succeeded to the ecclesiastical jurisdiction, courts of equity, for example, cannot as such avoid a marriage for impotency or consanguinity. Statutes sometimes confer this jurisdiction in unequivocal terms, but quite often include it with divorce jurisdiction, providing, for example, that a divorce may be granted for impotence. In such cases the word divorce will be construed to mean decree of nullity; and even where jurisdiction in such cases is not expressly given it has sometimes been held to be impliedly given with divorce jurisdiction. Statutes also in some states create additional causes for avoiding marriages. As to the persons and their status, jurisdiction, as in divorce cases, depends upon domicile.

The principles applied and procedure as to the canonical disabilities is like that of the ecclesiastical court, and, in general, is like that in divorce suits.

The causes of nullity are those of the canonical law, to wit: impotence, consanguinity and affinity; and such as may be created by statute, as the existence of a previous marriage honestly supposed to have been dissolved, under a New York statute, and absence of a parent's consent under a Scotch law. In Scotland a marriage can, within a year, but not afterwards, be avoided for want of parent's consent.

A voidable marriage may, in general, be avoided on the application of either party, but the decree must be passed during the lifetime of both parties or the marriage will be binding. Under statutes the state is sometimes given power to apply for avoidance of the marriage where the cohabitation is incestuous or otherwise criminal. Third per-

sons whose property rights are affected should be made parties defendant, and in some cases third persons may even apply for a decree of nullity; this is a doubtful question and the weight of authority is perhaps against such right.

The decree makes void what might otherwise have been valid. In the absence of statute it renders the marriage void ab initio; it declares no marriage ever existed. Thus, the children are illegitimate; the alleged husband has no rights in the alleged wife's property, nor have his creditors; and the sale of her chattel by him as husband is void. She can sue him for her property which he has taken, or for her services rendered to him before the decree. The communications between them are not privileged and a town settlement depending upon the marriage is void. Such a putative marriage is, however, sufficient consideration to support a marriage settlement. Such a decree is usually conclusive on all persons. Not being properly a decree of divorce, alimony is not incident to it, though if there has been a form of marriage, alimony pendente lite and counsel fees will be allowed. Under statutes, the effect of the decree is different; it may make the marriage null only from its date; the prior issue may be legitimate; the court may have power to adjust the property rights of the parties.

There are penalties in most states which parties may incur by omitting the various ceremonies prescribed for marriages. There are also various crimes which may attend the entrance into an illegal marriage such as fornication, adultery, miscegenation, incest and bigamy.

CHAPTER V.

HUSBAND AND WIFE

One of the fictions of the Common Law was, that by marriage the husband and wife became one legal person. By marriage, the woman lost her legal identity and became civiliter mortua; she was covered by or merged in her husband, was called a "feme covert," and her condition was called "coverture." In consequence of this fiction of unity of person in husband and wife, neither the husband nor the wife in the absence of statute provision to the contrary, can grant the one to the other an estate in possession during the lifetime of the grantor. The rule itself is one of those stubborn and senseless mandates of the common law which requires absolute obedience from the courts.

As we have seen in chapter one, the existence of the wife under the common law was hardly recognized; her property became vested in the husband (subject to some slight exceptions), and the wife became legally a mere menial of the husband. From this principle arises the necessity, at law, of all conveyances and covenants being made through the interposition of trustees. To the civil law this fiction was unknown. In equity the civil law was followed to a great extent and the fiction of unity was ignored. The Roman law treated the husband and wife as distinct persons who might have separate estates. It enabled them to make contracts and incur debts in their own names and permitted the wife to be sued without her husband.

The course of modern legislation has been universally to do away with this fiction in its strictness, and to recognize the separate existence of husband and wife. But great confusion has been caused by the fact that a technical rule of construction has led many courts to limit to a few cases statutes intended by legislatures to destroy this fiction generally. The general though tardy tendency of legislation in this country has been to make husband and wife equal in all respects in the eye of the law. The courts which have ever been conservative, construe these statutes in a spirit so narrow and illiberal as to almost entirely defeat the intention of the lawmakers; but generally with a promptness, enforced by female protest, a succeeding legislature would reassert in a more unequivocal form the same principles which the courts had before almost expounded out of existence. The fiction of legal unity affected at common law all the reciprocal capacities of husband and wife and many of their mutual rights and obligations; and by assuming that it was the wife whose identity was lost, gave rise to all the disabilities of married women. To illustrate: husband and wife being one person could not contract together or wrong each other civilly or criminally, or sue each other; they could not testify for or against each other, and a sale by a trustee to his wife was like a sale to himself.

The wife being merged in the husband took his name. If property vested in them with a third person, they took one-half, instead of two-thirds. If real estate vested in them they took one estate and became tenants by entireties.

By the common law, contracts between husband and wife are absolutely void for want of parties and the wife's power to consent. A mere personal executory contract between them is un-

qualifiedly void. In a Maryland case decided in 1873, it was held that a deed from a married woman of her separate estate, directly to her husband, is a nullity; and upon the death of the husband, he having survived his wife, the property will descend to her heirs at law. In Massachusetts a law was enacted in 1912 whereby conveyances of real estate by deed might be made directly from one to the other.

A wife can execute a power in favor of her husband and can deal with him in her representative capacities; but the validity of any other contract between them must be based either upon the doctrines of equity or upon the provisions of some statute.

In Equity the duality of husband and wife has always been recognized, and so has been the capacity of married women to hold, convey and charge by contract property which is called their equitable separate property, or their sole and separate estate. Any contract made directly between husband and wife will be valid in equity, if it would have been valid at law if made through a trustee or third party. Under the laws of California, if the husband purchases real estate with the separate property of the wife, but takes the conveyance to himself, the land thus purchased is also the separate property of the wife, as between the husband and the wife. Under the laws of Massachusetts, if a wife places in her husband's hands her separate property, to be used by him in his business, there is no presumption that he receives it in trust for her, but the burden is on her to prove the fact. In the absence of such proof, the money must be deemed to have been given to him with the intention that it should be applied to the use or benefit of either or both of them at his discretion.

One spouse cannot recover at common law against the other for slander or assault and battery. Nor does this right arise after the marriage has been dissolved by divorce. Nor does equity differ from law as to personal wrongs. As husband and wife are one, not only does their marriage extinguish all rights growing out of ante-nuptial personal wrongs, but while it continues it is a continually operating discharge of rights arising from such wrongs. Courts of equity do secure to married women the enjoyment of their property, and will prevent its destruction or injury by the husband. Under the statutes of Illinois and Iowa married women have been placed upon a footing from which they can sue their husbands for torts, even at law; but mere property acts do not give them this power; so that, a wife with statutory separate property which she holds as a feme sole cannot sue her husband in trespass or trover for breaking or removing it. She must take preventative measures to preserve it; criminal conduct of one towards the other is not authorized by reason of the relation of husband and wife. Prosecutions of husbands for assaulting their wives are common, but not common enough; and wives are frequently prosecuted (sometimes unjustly) for chastising their husbands.

The marital relation may prevent certain conduct of one relating to the other's property from being criminal. So one spouse cannot steal from the other. The general rule of law is, that a wife cannot be found guilty of larceny for stealing the goods of her husband, and that is upon the principle that the husband and wife are in the eye of the law one person; but this rule is properly and reasonably qualified when she becomes an adulteress. She thereby determines her quality of wife and her property in her husband's goods ceases.

A husband could always will his property to his wife, as to a stranger, for his will takes effect only upon his death and, therefore, after the marriage unity has been destroyed. But at common law the wife was merged in her husband and except under a power, or by virtue of a statute, or in a representative capacity, even now she cannot will at all. But when for any reason she can will generally to strangers, she can will to her husband, because, as already stated, the unity of husband and wife cannot interfere. So a general power in a deed, or in a statute, enabling her to will, includes wills to her husband. Some statutes expressly prohibit wills between husband and wife or limit the amount that can be willed; others put the surviving husband or wife upon an election between the will and the law. The effect of the will depends on the existing law at the time of the testator's death. A man's will is revoked by his subsequent marriage and birth of issue unless it provides for such issue by a former marriage. A woman's will is revoked by her marriage alone, unless by statute she has full power to make a will, in which case probably her will is revoked as a man's is.

A devise to "My wife" means, in the case of several wives, the wife at the time the will was made. If there was no wife at such time, but the testator was about to marry, his intended wife takes. A devise to "My wife" is void if the woman had deceived the testator into thinking himself married. And so of a devise to "My husband."

At common law suits between husband and wife are entirely unknown because husband and wife are one, and as has been seen, cannot be under obligation to each other either in contract or in tort. In equity, however, suits between husband and wife have been known from early times, and in courts of

equity have been enforced those obligations which, it has been shown, husband and wife could mutually incur. In such cases the wife is represented by a trustee or next friend. Thus at law a man cannot even confess judgment in favor of his wife, but when courts of law and of equity are combined, as in Pennsylvania, he can. A husband cannot at law sue his wife on a covenant to pay rent and one cannot sue the other for assault and battery. But in equity a wife can institute proceedings against her husband for the protection of her property.

A statute enabling a married woman to sue her husband does not enable her to sue him for a personal wrong to herself. Statutes authorizing married women to sue and be sued, as if unmarried, do not authorize suits between husband and wife, except in equity, for the reasons already given.

After the marriage has been dissolved by death or divorce, suits can be brought between the parties or their representatives, to enforce any right which existed during coverture; but such an event does not create rights, it simply removes impediments to remedies. It has been held in Massachusetts that a promissory note made and given by a husband to his wife before their marriage, becomes a nullity upon the marriage being performed and is not revived on the death of the husband.

At common law a wife had no property in possession during coverture, as will be seen, but her possession was her husband's possession, and even money in her pocket was deemed in her husband's actual possession; as a consequence, the possession of husband and wife was the possession of the husband, and so far as it was evidence of title at all, it was evidence of the husband's title. And although married women came to hold equitable, separate property and statutory separate

property, the presumption still exists that they have no property, and that all the property about the family home is in the possession of the husband and belongs to him. The presumption of the husband's ownership not only exists, but it continues even after his death, so that property held by a man's widow, who is also his administratrix, is presumed to be held by her in the latter capacity. The presumption in favor of the husband must be overcome in every case. Even when a wife has bought property in her own name, the purchase money is presumed to have been her husband's. This perhaps makes but little difference as far as her husband or a stranger is concerned, for as against them a gift (of the purchase money) from her husband to her is good, and may be inferred from circumstances; but as against her husband's creditors (as when she sues for taking her goods for her husband's debts), she must prove not only that the purchase was made for her, but that it was made out of her separate funds, or upon her separate credit. And it has even been held that a creditor of the wife, seizing goods alleged to be hers, must prove that they are hers and not her husband's.

As to real estate, it has been held that when the husband and wife live together on the wife's farm, the husband is presumed to be the tenant, and owns the crop, unless the wife proves that he farmed it as her agent. The occupancy, cultivation, and apparent control by the husband of the wife's lands where nothing appears to show his or her actual interest in them, will raise a presumption of tenancy in him, and consequent ownership of the crop. It is well settled, however, that a husband may manage his wife's property without acquiring any rights therein, or in any way rendering it liable for his debts. As the possession of husband and wife is

thus at best equivocal, neither can rely upon possession to prove acquisition of title from the other, and a wife can assert her title even to property which she has allowed her husband to have taxed in his name; and this is because it is the policy of the law to encourage the trust and intimacy of the marriage relation and there is no such thing as adverse possession as between husband and wife as long as they cohabit.

Gifts between husband and wife are valid and are not uncommon, but the donor's intention to divest himself or herself of the property, and the carrying out of that intention by delivery, must be clearly proved by the donee, wife or husband, as the case may be. Owing to the intimacy of their relations, actual delivery is very difficult to prove, and the only safe way of perfecting a gift between them is by constructive delivery by some writing or formal instrument, like a bill of sale. This is simply a wise precaution. This reasoning does not, however, apply to mere personal effects, or ornaments used by husband and wife, such as the wardrobe of the wife, or jewels, or other expensive personal articles which in a sense might be said to be appropriated to the use of the wife, or to such other property as the one or the other uses or enjoys alone.

In the case of conveyances by a debtor, the general rule is that if, after the conveyance is made, he retains possession of the property conveyed, such conduct is evidence of an actual intent to defraud his creditors, and must be explained. A change of possession ordinarily attends a transfer of the title of chattels, and therefore the law looks with jealousy upon a transfer of title without a corresponding change of possession where such change is possible, but as between husband and wife separate posses-

sion in the wife is not ordinarily possible, and is not therefore to be expected or required; as applied to husband and wife, therefore, this rule has given rise to much dispute. It is said that a husband's possession of his wife's property is not in itself evidence of fraud, because he has the right, growing out of the right of cohabitation, to use and possess her property in their home; but this is not true if his possession is not consistent with the purpose for which the property was given to or purchased by her. If a husband should give his wife, or sell to her, chattels for which she would have no use, but which he would have to continue to use in his business, as if a laborer should give his wife his horse, cart and tools, certainly, some special circumstances would have to be proved to rebut the presumption that he meant to secure himself against his creditors. A wife may make her husband her agent and be bound by his acts, as we shall see, but, on account of the presumed coercion of the wife by her husband, it is not a fraud if she stands by and allows him to say that goods which are really hers belong to him. This is on the general principle of estoppel, that he, who holds his peace when he ought to have spoken, will not be heard when he should be silent. Some authorities hold that a wife cannot assert her title to property of which she has allowed her husband to be the apparent owner and thus get credit; and this is certainly the rule if she has done this intentionally. In some states statutes especially provide that a schedule of the separate property of married women shall be filed, and that transfers between husband and wife shall be recorded; and it seems that general statutes which provide that "no property whereof the grantor shall remain in possession shall pass as against his creditors, unless by bill of sale duly recorded" apply to all transfers between

husband and wife where the grantor apparently remains in possession. So that to rebut the presumption of fraud, transfers between husband and wife should be by formal instrument duly recorded.

At common law, with certain exceptions named below, the rule was that a husband and wife could not testify, the one for or against the other, in any legal proceeding in which the other was a party, or which involved the other's pecuniary interests, or criminal responsibility. The rule is firmly established, however, that to exclude a witness on the score of a future interest it must appear that the judgment in the case in which he is called to testify can be used in evidence, for or against him, in a subsequent case in which he is a party. If such judgment can be so used, the witness is interested and his wife cannot testify. This was because husband and wife were one, and as no one could testify for or against himself, his wife could not testify for or against him; to allow one to testify for or against the other would be to endanger the harmony and confidence of the marriage relation.

The common law rule applied equally to the husband and the wife; and with differences to both civil and criminal cases. Legislation in Maryland has removed incapacity of husband and wife to testify for and against each other in civil matters, but not in criminal.

The incompetency of a husband or wife to testify for or against each other in criminal prosecutions at common law arose, not from interest in the result of the suit, but was based upon considerations of public policy, growing out of the marital relation, and could not be waived by consent of the parties. Just as soon as marriage exists, the rule applies, though one of the parties has been

summoned to testify before the marriage took place; but it has no application, except as to confidential communications after the marriage has been dissolved by death, or divorce.

The exceptions above referred to were as follows: husband and wife could testify for and against each other in prosecutions of the one for criminal injury to the other, as for assault and battery, rape, shooting and forcible abduction. Dying declarations of one who has been murdered are admissible in a trial of the other for the other. A wife's affidavit is evidence against her husband when she exhibits articles of peace against him. The necessity of the case made this and the above exceptions for in criminal matters of this character there are seldom other witnesses. Declarations of the one while acting as the agent of the other are admissible against the other. In trials for treason one was compellable to testify against the other. The rule was never applicable in purely collateral proceedings.

Statutes have almost destroyed the common law rule. Statutes abolishing incapacity to testify on account of interest do not change the rule as to husband and wife, whose incapacity, as has been seen, depends on other reasons as well; nor do mere general statutes authorizing all persons to testify affect the marital incapacity. The rule must be changed expressly, or by necessary implication; and a statute enabling the parties litigant to any suit and their husbands and wives to testify, does not change the common law rule in criminal suits. But when parties to suits are enabled to testify, and husband and wife are joint parties, he may testify as to his interest, and she as to hers. To illustrate,—In an action against a husband to foreclose a mortgage on a homestead, the wife may defend to avoid foreclosure of dower; and, as to this, may testify

for herself, but not in aid of the defence of her husband. When a statute provides that all parties may testify, except that husband and wife cannot in certain cases, they can in all other cases; no other view could possibly be taken.

Conjugal rights and obligations are those which attach to one as husband or as wife. They include not only the rights and obligations of husband and wife towards each other,—such as the right of cohabitation and the obligation to support —but also their rights and obligations towards third parties, such as the husband's right to recover damages for injuries to his wife, and his obligation to make good damage done by her; and then, these rights and obligations give rise to special suits which must be considered.

It is not essential to the validity of a marriage that the parties should love each other; and courts take no notice of the mutual feelings of husband and wife, except so far as these manifest themselves in conduct, and still the alienation of the affections of a spouse is one of the grounds of damage in a suit for criminal conversation.

Normally, and in the theory of the relation, parties who marry always contemplate cohabitation and sexual intercourse. The law not only presumes that husband and wife have a common home, but often that a man and woman living in a common home are married.

Cohabitation is in fact a conjugal right; the husband has a right to the wife's, and the wife to the husband's company; a husband's agreement to pay his wife to live with him is without consideration; I do not know how far he would be morally bound by a post-nuptial contract by which he hires his wife to live with him; but the legal obligation would not be recognized by any court. Each has the right to

enter the family residence; whichever owns it. The property may be hers alone, but the residence is equally his; the estate may be in her name, but the dwelling house, the domus, is that of both. It was not intended by allowing her to own her own property as fully after marriage as before that he should not sit at her table, use her furniture or house, or make love to her poodle dog if he so wishes.

Matrimonial cohabitation involves sexual intercourse and is presumably contemplated by those who marry; and from such cohabitation sexual intercourse is implied. In fact sexual intercourse is a conjugal right. If owing to some physical or psychic defect existing at the time of the marriage in one of the parties to a marriage, the enjoyment of this right is permanently impossible, the marriage may be avoided, as we have seen in the chapter on "Marriage." But the mere denial of the right does not work a forfeiture of any other conjugal right, and is not cruelty, or desertion, though it may be an indignity, and accompanying an offer to resume cohabitation, may render such an offer of no effect; nor does it justify separation. The excessive indulgence of this right by one of the parties to the injury of the other's health, or the insisting upon it when the other party is delicate, weak or ill, or by one who has a venereal disease, is cruelty and justifies separation, or a suit for divorce. This right is waived or forfeited with the right of cohabitation. If one of the parties indulges in sexual intercourse with anyone but the other spouse, the injured spouse may sue for divorce for adultery, as we shall see in the chapter on "Divorce," or (it has been held) may kill the third party in flagrante delecto, and be guilty only of manslaughter.

The husband is the head of the family, notwithstanding statutes giving the married women

great power as in Michigan. He decides where the family residence shall be and may change it as often as his pleasure, business or health dictates; and his wife must live where he directs, as long as he acts in good faith, and in spite of an ante-nuptial contract to the contrary. This is an illustration of the elementary principle of law that fraud vitiates everything.

But she has the right to live with him, and he cannot banish her to a lonely or obscure place; nor can he take her to a place where her health is endangered, for this would be cruelty; nor, perhaps, can he remove her from her native land or make her live with his relations.

Consequently, a husband's domicile is usually the place where he has established his family, although during his absence his wife has moved, and the wife's domicile, except in certain cases where she has a separate domicile for divorce, is that of her husband. So the husband may decide who shall visit the family home and may prevent its being used for purposes of prostitution, or illegal liquor selling, although it belongs to the wife. How far he may use force in restraining her is not precisely settled. But there can be no doubt that he may exercise as much power as may be reasonably necessary to prevent her, as well as other inmates of the house, from making it a brothel. The common law doctrine is that the wife is under the husband's protection, influence, power and authority, and that he is the head of the household. When the husband is insane or absent the wife is the head of the family. The husband being the head of the family, the wife and children generally adopt his family name—by custom, the wife is called by the husband's name. But whether marriage shall work any change of name at all, is after all, a mere question of choice,

and either may take the other's name, or they may join their names together. In general, wives have surnames by courtesy only, adopted from their husbands, and it is inconvenient that they should have appellations different from their husbands.

The husband as head of the family has a right of gentle restraint over his wife's movements. He may, by reasonable measures, enforce cohabitation and a common residence; he may lock her up to prevent her from eloping, or going into lewd company and squandering her money, and she will not be released on a writ of habeas corpus; nor is it of itself cruelty if he prevents her from visiting her family, or relations, or from going to church, that is, if he merely prevents her from going to a particular church. But he has no right to confine her unreasonably or arbitrarily, and if he does so she will be released on a writ of habeas corpus; so if he injures her health by moral or physical restraint, it is cruelty. But a husband cannot get possession of his wife in any case by a writ of habeas corpus, unless she is restrained against her will. If the wife is an infant, the husband or her parents in the discretion of the court, may be awarded custody of her.

If the husband is insane, the wife is the head of the family, and has a right, superior to that of his father, to be his guardian. But a wife has no right to lock her husband up corresponding to that of the husband, above discussed. Though the old writers say that a husband may chastise his wife with a rod no thicker than his thumb, modern law recognizes no such right, and a husband is not justified in beating his wife even though she be drunk or insolent. Wife beating in certain states is a special misdemeanor.

A husband is bound to support his wife, and a wife may be bound to support her husband; and

husband and wife may be bound to support their family.

By the common law the husband is bound to support his wife. It is an unquestionable rule of law that if a husband turn his wife out of doors, or by his misconduct compel her to leave him, she goes forth under such circumstances to the world with an implied credit for necessaries. In other words, he is bound to provide her with necessary lodging, clothing and subsistence, and in case of her sickness, medicine, medical attendance and reasonable expenses incurred during illness; and if he fails to make such provision, she may obtain the same on his credit, and the person so making it may sue the husband and recover therefor, even though the husband be a minor. If old enough to contract marriage, a minor is liable on contracts for the necessary board and lodging of his wife and children. He cannot charge her or her estate with the expenses of her support.

The wife may enforce her right to support directly by a suit for maintenance, or for alimony with divorce, or indirectly, by pledging his credit to others who supply her with necessaries.

The husband's neglect of this duty, if it results in her death, is manslaughter at least; and sometimes a husband's failure to support is punishable criminally by statute; and by statute it may be a cause for divorce. The obligation cannot however be enforced if the wife has sufficient means of her own, or has waived or forfeited her rights. She may waive her rights for valuable consideration, as in a deed of separation. She forfeits them by leaving her husband against his will when he is not in fault. To illustrate:—A wife left her husband's house without his consent and without justification, and went to the house of the plaintiff with her nursing

babe, and the husband made repeated efforts by himself and through others to procure her return and tried to induce the plaintiff to assist him, in the same purpose, but the plaintiff made no endeavor to persuade her to go back to her husband, and forbade the husband coming to his house. It was held in Illinois that, in the absence of any express agreement to pay, the husband was not liable to the plaintiff for the board and lodging of the wife and child. She may also waive her rights if her husband leave her for her fault. To illustrate,—If a husband has put away his wife for adultery, he is not liable, even for necessaries supplied to her, if it be proved on the trial of an action for the price of such necessaries that she has been guilty of adultery. She does not waive her rights however, by becoming insane; "For that is no fault of hers," according to an Alabama decision.

The husband's obligation to support his wife is not destroyed by married women's separate property acts, except so far as through them she has means of her own and if she has such provision it lies on the husband to show it. The right ceases with divorce, but may continue some time after the husband's death. An example of this is found in the old English statute of Henry III, ch. 7, section 3, which provides that the widow "shall tarry in the chief house of her husband by forty days after the death of her husband, within which days her dower shall be assigned her." This was called the widow's "quarantine."

By the common law, all the wife's personalty, and all her earnings and labor, belong to her husband, and even under separate property acts, she is still his helpmeet, and cannot charge him for domestic services; in this way she is bound to support him. In some states statutes, which seem to

have given rise to no decision by a supreme court, create various means of making a wife support her needy husband.

Husband and wife are both liable for the support of their family, so far at least that one cannot recover from the other for expenses paid. And statutes in Alabama and Iowa make them jointly liable.

A wife has no right to her husband's services, though he is bound to support her, as has been seen.

At common law, however, a husband has an absolute right to his wife's time, wages and earnings, and the products of her labor, skill and industry. Nowhere has it been adjudged that her earnings or the product of them, made while she is living with her husband and engaged in no separate business, are not the property of the husband when the rights of his creditors have been asserted against them. He may even contract to furnish her services to others, and sue for the price of them and for the loss of them in his own name. She cannot release an obligation for them, except as his agent, or by his consent. Even if her earnings have been invested, the investment is pro tanto his, and may be seized by his creditors.

The husband may forfeit this right by desertion; the marriage relations having ceased, the right to the wife's service, which is an incident to cohabitation, also comes to an end. He may also waive this right under the laws of New Jersey, and it has been the first to be destroyed by the statutes.

The husband, in equity, independently of statute, may give up his wife's earnings; this may be done either by an ante-nuptial or a post-nuptial settlement. The mere ability to earn is not property, however, and a husband may, therefore, waive the right to have his wife labor for him, even as against

his creditors; but moneys received or due for labor, earnings in the fuller sense, are property, and a gift of such must not defraud creditors. If with the assent of the husband, the wife were to carry on any kind of business she would be entitled to the profits, if it was bona fide hers, and not intended to shield the husband's property from his creditors; so no reason is perceived why a husband might not, if the transaction were not tainted with fraud, permit his wife to raise and sell grain, stock and other farm products and receive the profits. But in such case the transaction would have to be fair and free from fraud as to creditors.

The burden of proof lies upon the wife to clearly prove the gift, for her earnings, as has been seen, belong prima facie to the husband.

Married women's property acts which do not refer expressly to earnings, do not change the husband's common law rights in the same. So a statute which provides that a married woman may earn money on her separate account, does not affect her earnings, unless it appears that they were acquired by her on her separate account. Under such statutes, the product of all labor of hers for parties other than her husband, belongs to her; she can contract for her services and recover on the contract; she can sue alone for them, and make her husband, if need be, garnishee; a debt due by her husband cannot be set off in such a suit; and neither her husband, nor his creditors, have any right to such earnings, though as with her other separate property, she may give them to her husband, and such a gift, it seems is presumed, if, with her consent, and without promising to repay her, he uses them, or mixes them with his own money.

But these statutes do not implicitly authorize contracts between husband and wife for her serv-

ices, and she cannot recover from him for services rendered; though this may perhaps be done if the statute itself or some other statute authorizes contracts between husband and wife. She is still bound without charge to look after his home and children, and to perform the domestic duties of wife; she is still his "helpmeet."

There is no liability of a wife for contracts of her husband, and a wife could not make any contracts at common law for her husband to be liable on, though she could charge him as his agent, in law, or in fact. And when, under statute or otherwise, a wife can make contracts, her husband is not liable upon them as husband, though he may, of course, be liable if he joins with her.

But as to a wife's ante-nuptial contracts, her husband comes into full liability, and he is liable on all such contracts of hers, whether he gets any property with her or not, and even though he be a minor.

On such contracts husband and wife must be sued jointly. The husband's liability ceases with the coverture, unless it has been fixed by judgment. If the wife dies after judgment he continues liable; if he dies his estate is liable. If not fixed by judgment, the husband's liability is destroyed by an absolute divorce, by his death, or by hers. But marriage does not suspend or destroy her liability, so that, if he dies, she continues liable; and if she dies, her administrator is liable to the extent of assets even though he be her widower; and she is liable after an absolute divorce. The statute of limitations runs for her during coverture.

Bankruptcy of the husband at common law destroyed any right to bring suit at all during coverture, at law; but in equity she could perhaps be held liable if she had separate property. This

liability is not affected by any ante-nuptial or post-nuptial agreement between the husband and wife; nor do married women's statutes destroy the husband's liability, unless they so state, except in Illinois. But in many states there are statutes expressly destroying this liability or limiting it to the amount of the property gotten by the husband from his wife.

There is no liability of a wife as wife for her husband's torts, but a husband is generally liable for those of his wife.

A husband at common law takes his wife with all her liabilities, and he is, therefore, liable on her ante-nuptial torts, for the same reasons and to the same extent as he is liable under ante-nuptial contracts; and to the same extent, also, as he is liable for her post-nuptial torts committed out of his presence and without his direction. This liability extends to acts done by her in a representative capacity, for example as guardian or administratrix. It is in many states removed by express statutes, but the weight of opinion is that it is not affected by married women's property acts.

A husband, at common law, is liable for all torts committed by his wife during coverture; it makes no difference if they are living apart, so long as he is really her husband. But he cannot, unless his wife is agent in fact, be liable for a wrong of hers based on her invalid contract, as where she got credit pretending that she was unmarried, or misappropriated money placed in her keeping. If he allows her to act as administratrix, he is responsible for all her torts; but her unauthorized dealing with an estate does not render him liable as executor de son tort.

For these torts, a husband may be liable, ac-

cording to their character, alone or jointly with his wife, as follows:

(1) If the tort is committed in his presence, and nothing more appears, it is his sole tort, as she is presumed to act under his coercion.

(2) If the tort is committed in his presence, but she appears to have acted deliberately and freely, it is their joint tort.

(3) If the tort is committed in his presence and against his will, it is her tort, and he is liable with her.

(4) If the tort is committed out of his presence, but by his direction, she is jointly liable with him.

(5) If the tort is committed out of his presence and without his knowledge and consent, he is liable with her.

Where a wife spoke slanderous words of the plaintiff out of the presence of her husband, without his knowledge or consent, the husband was held to be jointly responsible with his wife, although it was urged that he did not become particeps criminis, and should not be found guilty without having been accused, and having an opportunity of defending himself.

In cases 1, 2, and 4, just stated he is liable because she is his agent, and to the same extent that any master is for the act of his servant. In cases 3 and 5, he is liable because she is his wife, and, as is the case with his ante-nuptial contracts and torts, his liability, unless it has been fixed by judgment, ceases with the dissolution of the marriage. In case 1, she cannot be sued. In cases 3 and 5, he cannot be sued as joint-wrongdoer, but must be sued as husband. In cases 2 and 4, they are jointly liable for a joint tort.

The husband's liability for his wife's torts, as

husband, has been removed by statute in some states; but such statutes do not destroy his liability in cases when he is liable as master. But his liability is not affected by general married women's property acts, except in Illinois and Kansas, or by a provision that a husband shall not be liable for his wife's debts. Still, when a wife may sue and be sued as to her separate property without her husband, he is not liable for a tort committed by or through it, unless he took part in the tort, as where the wife's farm, for instance, contains a nuisance, or her cattle have committed depredations. But he is liable with her for conversion when she receives stolen goods in the course of her separate business, as she never legally acquired the goods. A husband is not liable for the torts of an insane wife.

Marriage never renders a wife liable for the crimes of her husband; but a husband is liable for all crimes of his wife committed during coverture in his presence and with his knowledge and consent. According to circumstances he may be liable as principal, or as accessory, and alone or jointly with her. Nor have married women's statutes changed this common law liability of his.

(1) If it appears only that a criminal act was committed by the wife in the presence of her husband, she is deemed to have acted under his coercion, as she is under his power and he is liable alone. In a recent Massachusetts case a married woman was on trial for keeping a liquor nuisance, and there was evidence of a sale made by her when her husband was in the yard outside. It was held, that an unqualified instruction to the effect that a sale thus made was not made under constraint, was erroneous. She is in legal contemplation in his presence, though he is not in sight, if he is nearby and she is acting under his supervision.

(2) If it appears that a criminal act was committed by the wife in the presence of her husband, but of her own free will, he is jointly liable with her, for it is his duty and right to prevent her from doing wrong, with force if need be. How far he may exercise force in restraining her is not precisely settled. But there can be no doubt that he may exercise as much power as may be reasonably necessary under the circumstances. Probably his bona fide endeavors to prevent her from committing the crime would be a defence. Of course, if he aids and abets her he is liable; nothing could be clearer than this proposition.

(3) If it appears that a criminal act was committed by the wife out of the presence of her husband, but with his concurrence or assent, he is liable, just as any one is liable for the acts of his agent.

(4) If it appears that the criminal act was committed by the wife out of the presence of her husband, and without his knowledge or assent, he is not liable at all. To illustrate: A husband is not criminally liable for the act of his wife in selling liquor without a license when the sale is made in his absence and contrary to his express instructions.

But a husband cannot be guilty of conspiring with his wife, unless the conspiracy was consummated before their marriage, or there are other co-conspirators; this is a necessary result of the merger of the wife in the husband.

The husband must, generally, except when some statute expressly authorizes the contrary, be joined in all suits to which his wife is a party. As has been seen, a husband is generally liable to be sued with his wife on her ante-nuptial contracts, and for her torts, and to be prosecuted with her for her crimes; he usually sues with her on her con-

tracts, and for injuries to her, in fact he is commonly joined with her in all her suits. He is also liable alone as husband for her wrongs done in his presence and he has the right to sue alone for any infringement of his conjugal rights to her services, affection and fidelity; and hence, arise rights of action against one who injures his wife or entices her away from him or has sexual intercourse with her; and these rights of action will hereafter be separately discussed.

If one spouse wrongfully left the other, the latter could formerly bring suit in the English ecclesiastical court to compel cohabitation, and this was called a suit for restitution of conjugal rights. Such a suit may still be brought in England, but it is unknown in the United States where cohabitation cannot be directly enforced. No court in this country has any power to compel discordant husbands and wives to live together.

A husband is bound to support his wife, unless she has forfeited her right, or waived it, and unless she can support herself; where a husband abandons his wife without just cause and casts her upon society destitute of the means of subsistence, a court of chancery, as an original ground of equity, will entertain a bill filed against him for alimony. In some states there are special statutes authorizing a wife, who, without fault on her part, is left without means of support, to sue her husband for maintenance. If a husband by his extreme cruelty, renders it justifiable for his wife to live apart from him, she may maintain an action against him for a suitable separate support, without applying for a divorce. In some states, courts of equity, in the exercise of their ordinary equity powers, grant alimony without divorce. To sustain her action, the wife must be living apart from her husband without fault, and

must be without support. She cannot maintain her suit when she is in fault.

The procedure in general is like that in suits for alimony with divorce; it all depends upon statutes and the rules of court. The suit must be instituted during the husband's life, and abates on his death; the marriage relations have then ceased. If a divorce suit is regarded as a suit in rem, the res is the marriage status, and is completely destroyed by death. If it is regarded as a personal suit, it is one which the injured husband or wife alone can prosecute.

Inasmuch as a husband is bound to support his wife, unless she has forfeited or waived this right, or has adequate means of her own, when he neglects to support her, whether they are living together or apart, she may pledge his credit for necessaries; he is bound to reimburse anyone supplying her with such. In such cases the husband's liability is due to the fact of his marriage, and he cannot relieve himself thereof by prohibiting his wife from pledging his credit, or by a general newspaper advertisement that he will not be liable for her debts, or by special notice to the party who supplies her not to give her credit.

A husband is not thus liable by the mere fact of his marriage if the wife has sufficient means of her own, or is provided for in any other manner; for example, if supported by someone else. By a bare deed of separation, a wife does not waive this right, but only by agreeing upon an adequate allowance which is duly paid. She forfeits her right if she commits adultery, or by wrongfully leaving him against his will; for instance:— If a wife elopes with an adulterer, or even if she elopes from her husband without cause, the husband is not liable upon her contracts. In the absence of any special promise of

the husband to pay for the board and lodging of his wife, living apart from him, to a third person, he will not be responsible therefor, unless she was living separate from him by his consent, or his conduct was such as to justify her in leaving his bed and board. Necessaries in this connection are articles bona fide purchased for use and not for ornament, which are really needed, and which are consistent with the social position and condition in life in which the party moves. A husband was held not liable for the rent of a church pew hired and occupied by his wife without his assent, and it was decided that religious instruction does not belong to the class of necessaries as that term is used in the common law. Following are a few examples of what may be deemed necessaries: food, clothing, furniture, medical services and legal services under certain circumstances. Money loaned to the wife, even if used for necessaries, is not regarded as a necessary. For his wife's funeral expenses a husband is always liable, though at the time of her death she lived apart from him for her fault—the husband surviving is bound to bury the corpse of his wife.

The wife's right to pledge her husband's credit, which is based upon his marital duty to support her must be distinguished from her analogous right, which is based on his holding her out as his agent. In the latter case his liability is a mere question of fact, and he cannot be held responsible, unless he has expressly or impliedly, by long mandate or subsequent ratification, authorized her to pledge his credit, or has so conducted himself as to estop him from denying his authority. In such cases he is liable not only for necessaries but for any purchases.

Under the common law, on the application of a wife, who showed herself to be in danger from her

husband, a court of equity would grant her a writ, called a writ of supplicavit, requiring her husband to give security to treat her properly. The writ is unknown in the United States, where an ordinary bond to keep the peace serves all its purposes.

A wife has no right of action for injuries to her husband, unless under some such statute as a civil damage act. Perhaps she has a right of action against one who entices him away. Two actions may arise in favor of the husband out of an injury to the wife, one in the right of the wife, in which the husband and wife sue jointly for the direct injuries to her, the other in the right of the husband in which the husband sues alone for consequential damages to himself. The well-known general doctrine of the common law is, that where a wrong is committed against the person of the wife during coverture, as by beating her, slandering her reputation or by malicious prosecution, she cannot sue alone. For injuries to the wife occasioning to the husband a deprivation of the society of his wife or of her assistance in his domsetic affairs, by which he is put to expense, he may have his separate action, as where a violent battery has caused a long continued illness of the wife or expense in her cure. But if the action is brought for her personal suffering and injury the husband and wife must join, and care should be taken not to include in the declaration a statement of any cause of action for which the husband alone would be entitled to recover.

Since these suits are in different rights, husband and wife cannot be joined. Recovery in one suit is conclusive as to the right to recover in the other, but no damages can be allowed in the one which are allowable in the other.

A husband is entitled to his wife's society, as well as her services, and against any one who, by

abducting her or inducing her to leave him, or keeping her separate from him, deprives him of her society and services, he has a right of action. There are numerous cases in which the right of action of the persons bringing about the loss of the wife's society to the husband is justifiable; if the wife has a ground for divorce against her husband, and a stranger, being consulted by her, or a parent advises her to leave him and get a divorce, and acting on such advice she does so, the husband has no right of action. Parents are justified in opening their daughter's eyes to the bad character of their husbands if they use no misrepresentations. Harboring a wife may be justifiable, when causing a separation would not be. The motives of the harborer are important and must not be to separate husband and wife; those of a parent are presumed good. The motives are shown in such acts, in addition to giving shelter as concealing the wife, or denial of access to the husband. The husband must, in the case of mere detainer, show demand and refusal. A wife is entitled to the society of her husband, and when she may sue without her husband for injuries to her, she may sue one who separates her and her husband. At common law, a wife could not maintain an action against a defendant for having, by his wrongful acts, advice and persuasion, induced her husband to abandon and become separate from her, whereby she is deprived of his society, support, maintenance and help. Damages awarded in such an action as might be brought, should cover the value to the plaintiff of the spouse whose society has been lost, as well as actual pecuniary loss, if any.

Inasmuch as the husband has the exclusive right of sexual intercourse with his wife, necessarily he has a right of action against anyone who commits adultery with her.

I apprehend the law to be that the husband will be entitled to recover, unless he has, in some degree, been a party to his own dishonor, either by giving a general license to his wife to conduct herself as she pleased with men generally, or by assenting to the particular act of adultery with the defendant, or by having totally and permanently given up all the advantage to be derived from her society.

(1) Under statute the husband's action may form a part of a divorce suit for adultery, the complaining husband making his wife's paramour corespondent with her, and asking for damages from him. It is in the nature of a personal suit.

(2) In the declaration, the adultery need not be so specifically alleged as in divorce cases; counts for loss of services, and for loss of society may be joined, but proof of neither is necessary to support the suit. The gist of the action is the adultery or criminal conversation. The sole defence seems to be that the plaintiff consented to the wife's adultery with the defendant, or consented to her living as a prostitute. Numerous other defences have been attempted. It is no defense that the plaintiff was living apart from his wife before the adultery complained of.

The adultery is proved as in divorce cases. The wife can generally, testify as we have seen.

The damages allowed in suits for criminal conversation are penal rather than compensatory, for the plaintiff is entitled to substantial damages though he prove no resulting expense or loss of society or services. They are often exemplary or punitive. The jury considers the value of the wife, and, in that connection, how much the husband saw of her and cared for her, her easy fall, and how far it was caused by the plaintiff's disregard of his

marriage obligations. In an action for the seduction of the plaintiff's wife, it is competent for the defendant to prove, under an answer of general denial in mitigation of damages, that, owing to the wicked and depraved disposition of the plaintiff, he and his wife, before the alleged improper intimacy, lived unhappily together and that he had been in the habit of treating her with extreme cruelty. The jury may consider the dishonor of his bed, the doubts cast on the pedigree of his children, the loss of his wife's comfort and assistance, the defendant's wealth if he used it to seduce the wife, to enhance damages. But evidence of the defendant's poverty may not be introduced to diminish them. The jury cannot consider the injury to the honor, reputation, and happiness of the plaintiff's family.

There are statutes in many states which give a right of action to anyone who is injured in person, property or means of support. In Massachusetts a husband may maintain an action under the statute for injury to his means of support, by the intoxication of his wife, caused by intoxicating liquors sold to her by the defendant; and a wife for loss of the husband's support caused by intoxication and she may recover actual, and in certain cases exemplary, damages. Such suits are unknown independently of statutes.

An agent is a person whose act on behalf of another, called the principal, is duly authorized. Such authority may be derived from the law, and an agency in law is thus created; or from the principal, in which case an agency in fact is constituted. All acts which one spouse may do for the other because they are husband and wife are done by virtue of an agency in law; for all other acts which one spouse may do for the other there must exist such

other prior mandate, contemporaneous assent or subsequent ratification—an agency in fact.

(a) In Law.—A logical application of the common law fiction that husband and wife are one, would make all of the acts of one in law the acts of the other; but as the wife's normal status is one of lost identity and legal disability, her acts are not legally acts at all, and bind no one. Only when the husband's disregard of his conjugal obligations renders her condition abnormal, has she authority in law to act for him—as when he refuses to support her and she pledges his credit. On the other hand, the husband does, at common law, cover and stand in the place of his wife. He may for example, release an ante-nuptial debt due her, and notice to him may be notice to her. Besides this common law agency of the husband, statutes in some states give him some authority to deal with his wife's separate property.

(b) In Fact.—There is nothing in the marriage relation to prevent one spouse from being agent for the other, though the unity of husband and wife may render void a contract between them for compensation; and, therefore, whatever a husband can do through any agent, he can do through his wife, and a wife who may act by agent at all may act by her husband as her agent.

I am now dealing mainly with agency in fact of the husband. I shall discuss his agency in law under his marriage rights over her person and property in subsequent paragraphs. His authority is co-determined with these rights. Thus, he may sue for her earnings, because he is entitled to them by law; and for the same reason, at common law, his receipt for a legacy to her was valid.

As her agent in fact, he must have her prior authority, contemporaneous assent or subsequent

ratification; his agency may be revoked, and is revoked by her death. Whatever a married woman can do through an agent she can do through her husband. A married woman who has a separate estate may engage her husband to act as her agent in the transaction of any business she may have, and if she do so, his acts as such agent stand as to her and to the world as do the acts of other agents. Her authority may be given in the usual modes, by power of attorney, by parol, or by conduct. Whether it was given is a mere question of fact. If she allows her husband to use her property as his own, she is bound by his dealing with it, but not if he holds it wrongfully. To illustrate:—When a husband receives payments of money on an obligation to his wife, the possession of the obligation is evidence tending to prove he has authority to receive the money for his wife, but is by no means conclusive of the fact—he may have obtained possession thereof surreptitiously, and, hence, with no warrant to receive payment for her. Most difficulty is found where the wife, by her conduct, appoints her husband agent. To illustrate:—If, without objection, she sees her rents paid to him, or sees him sell her chattels, she is bound by estoppel; but she cannot be bound by estoppel where she could not have been bound directly.

The purposes for which a wife may employ her husband as agent are innumerable; he may be her clerk, the master of her vessel, or the cultivator of her farm. A wife cannot ratify what she could not have authorized. To illustrate:—The wife, having no power to consent to the application of her money to her husband's debts, has no power to ratify such application, even on compensation being made to her by her husband in property, without the allowance or approval of a court of chancery,

or of the superior court of the county of her domicile. In all cases of the husband's agency, the wife is entitled to the benefits and is bound by the liabilities resulting from his acts.

As her agent in law, the husband has no power to act for his wife in her separate existence, because he has no rights in her separate estate; therefore, notice to him in respect to the wife's separate property is not notice to her.

As her agent in fact, the husband's powers are measured by the scope of authority conferred. If he exceeds his authority, he is personally liable. His agency is proved as that of a stranger's, though the fact that he is husband is relevant, as in most cases the husband is, or ought to be, the fittest person to be his wife's agent.

There is no implied contract that a wife will pay her husband for his services, for in helping to make her property productive, he is but discharging his duty to support his family. Hence, in the absence of an express agreement to that effect there is no implied obligation on the part of the wife to compensate the husband for his supervision of and labor bestowed upon her separate property.

Contracts between husband and wife are in most states void, and, therefore, there is usually no express contract by a wife to pay her husband for his services. Many cases arise where the husband, for the purpose of evading his creditors, pretends to be acting as his wife's agent, when he is conducting a business of his own.

A wife has no authority in law to act for her husband except for the purpose of realizing her right to support; in all cases she must be his agent in fact. A wife, as such, has no original or inherent power to make any contract which is obligatory on her husband. No such right arises from the marital

relation between them. If, therefore, she possess a power in any case to bind him by her contracts made on his behalf, it must be by virtue of an authority derived from him, and founded on his assent, although such assent may be precedent or subsequent, and express or implied; and this is the light in which such contracts are universally viewed.

If a man places his wife at the head of the household, or in charge of his business, he confers upon her such powers as persons in these positions usually exercise. By ratifying her acts on one occasion he may constitute her his agent for future acts of the same kind. In certain cases he is estopped from denying her authority. Thus, if he sees her selling his property without asserting his rights, he cannot afterwards deny her right to sell. So if he suffers her to collect debts which in law are his.

If his wife, without authority, has done some act for him and he subsequently recognizes it as his, he ratifies her act and makes it his. He does not, by resuming cohabitation with his wife, ratify her act committed during a separation.

If a husband is absent from home and has left his wife in charge of his house, his business or his property, she has, as his agent, such powers with respect thereto as persons in such positions of trust usually exercise. If he has left her in charge of his affairs, his private directions do not limit her authority to act for him. During her husband's absence the wife is the head of the family, and may do all things relating to the family and family home which wives usually do. There seems to be a presumption, rebuttable, of course, that if a business is carried on in the house where they live together, she is his agent, and a jury is justified in finding her agency for him from the fact that she was seen more than once in charge of the business. The

wife cannot testify as to the fact of her agency, though the fact being proved, her declarations as his agent bind him.

Since, by marriage, the parties, at common law, become one person, and the husband is the one, he naturally stands in her place, and while he is husband has possession and control of all property which would have otherwise come into her possession and control; but she has, during coverture no estate in his property. So that all the profits of the land they occupy, or of the money or chattels that come into their possession, belong to the husband.

But courts of equity very soon recognize the wife's separate existence and preserve for her sole and separate use all property settled on her for this purpose; and statutes have now been passed, almost everywhere, destroying wholly or partially the husband's rights over his wife's property during coverture.

After marriage the husband holds his own property substantially as before. During his life his wife has no present estate, but on his death she has dower or other share of his realty, and thirds or other share of his personalty, which estates or shares of hers he cannot defeat by deed or will.

In his wife's estates of inheritance, a husband has, during coverture, a free-hold estate jointly with his wife, with absolute ownership of the rent and profits; this estate may be the estate of curtesy initiate, or simply the husband's estate during coverture jure uxoris. The estate during coverture jure uxoris differs from curtesy initiate, in that it is a vested estate in possession, while curtesy initiate is a contingent future estate, and it is independent of birth of issue; it is held in right of the wife, and is not added to or diminished when curtesy initiate arises.

A husband has this estate in all his wife's common law estates of inheritance in possession; and he has a joint seisin with his wife in all her estates of which she is seised, whether of inheritance or for life, and whether several or joint. But settlements and statutes have been chiefly occupied in destroying this estate, so that, as a general rule, a husband has no such estate in his wife's equitable, separate or statutory separate property.

In this estate he is seised jointly with his wife, and while he can himself claim the rents and profits and severed personalty, he can sue in ejectment only with her. He can convey his interest and the same is liable for his debts, but on his death the property passes to her again free and clear from all acts of his.

In his wife's life estates a husband has practically the same estate during coverture as he has in her estates of inheritance. If her estate were for her life, it terminated on her death and he took nothing but emblements; if her estate were per autre vie, he took, probably as special occupant; but in no case could he have curtesy. If, before marriage, she had demised her life estate for the term of her life, her interest is simply a chose in action.

In his wife's chattels real, as, for example, lands leased to her before or after marriage, the husband has, at common law, an almost absolute estate, with powers of sale, mortgage, and disposition; but without any power to will them. If he survive his wife his ownership is absolute, just as his ownership of her personalty is; if she survives she takes them much as she does her choses in action not reduced to possession. His rights in such estate may, of course, be excluded by an equitable or statutory settlement.

At common law, all the wife's personalty in

possession vests in her husband absolutely and he may reduce her personalty not in possession (her choses in action) to possession, and thus make them his absolutely. Thus, he owns absolutely money in her possession at the time of her marriage.

In equity, unless the personalty is settled to the wife's sole and separate use, the husband has the same rights to his wife's personalty as at law, except that she may claim her equity to a settlement out of such of her choses in action as he comes into equity to reduce to possession.

Under statutes, the husband's right in his wife's personalty is frequently destroyed. But a statute relieving a wife's property from her husband's debts has not this result.

Statutes do not affect existing rights in possession, and they are generally construed not to affect existing rights in choses in action; but they can destroy the husband's right to reduce his wife's choses in action to possession.

Personalty in possession of the wife is in possession of the husband, unless she holds it in a representative capacity.

Personalty in possession of the husband may still not be in his possession as owner; he may hold her separate personalty as trustee of the wife, or as her agent, and in such cases the personalty so held by him does not fall into the class of personalty in possession.

The wife's personalty in possession of her agent, trustee, guardian, tenant in common, or any one not holding adversely, is constructively in possession of her husband. If a debtor of a married woman pays to her during coverture the debt due, the payment inures to the benefit of the husband and the money becomes absolutely his. And in like manner the husband is entitled absolutely to all

sums of money which may be received by a third person on her account during marriage. But some difficulties arise in deciding when a person holds adversely. It is held in Massachusetts that personal apparel furnished by a husband to his wife, or purchased by the wife, with the consent of her husband, with money given her by him from a fund formed by their joint earnings, remains the property of the husband, and the wife cannot maintain an action against a carrier for the loss thereof.

All such personalty the husband owns absolutely and unqualifiedly.

The husband's only right over his wife's choses in action is to reduce them to possession, therefore, a husband cannot dispose of them by will; when so reduced they are personalty in possession, and vest absolutely in him. At common law a husband had a naked power over the choses in action of his wife, but it was one which he was not obliged to exercise, even for the benefit of creditors. This right of the husband over his wife's choses in action must be exercised during coverture. It ceases with the death of either party, or with absolute divorce. It was held in an early Massachusetts case that marriage is an absolute gift to the husband of all the wife's personal chattels in possession; and so it is also of choses in action, if he reduces them to possession by receiving or recovering them at law. But on the dissolution of the marriage, either by the death of the husband or by a divorce, choses in action not reduced to possession during the coverture remain the property of the wife. Usually it is said that choses in action differ from choses in possession, in that the former survive to the wife. Though choses in action are property, they are not so far the husband's property as to pass under an assignment of all his personal property. An assignment in bank-

ruptcy has not the effect of reducing into possession a chose in action belonging to the wife, so as to destroy her rights of survivorship. Even though the husband get possession of her property, it is a question of intent whether it is or is not reduced to possession. If the husband has obtained the possession of the property without suit, and it still remains in his hands, he will in many cases, be adjudged the trustee of the wife. He may get possession as administrator, agent or trustee, but to reduce he must take possession as husband.

The individuality of the wife, by the common law, is merged in that of the husband, as we have seen, and during coverture, she could not hold property or exercise property rights. Through marriage, by operation of law, all her personalty in possession passed absolutely to her husband, he acquired a right to reduce her choses in action to possession, and thus make them his own; of her chattels real he became practically absolute owner, and he was entitled to all the rents and profits of her real estate. She could not acquire property without his consent. But from the earliest times, courts of equity encroached on this simple and savage system, and statutes have now more or less abolished it in every state where the common law has been in force.

The husband's allowance to his wife for her dress and personal expense is pin money and it takes various forms; sometimes it takes the form of a gift to the wife of her savings out of the household expenses.

A wife's equity to a settlement is her right enforcible in equity to have a settlement for the benefit of herself and her children out of her equitable choses in action. This settlement may be made by a court of equity or on application of a trustee, or

of the husband, or of the wife, out of any fund over which it has jurisdiction. Whether a settlement shall be made seems to be determined by the practice of the particular court, and to be within its discretion. The amount depends on the special circumstances of each particular case. The children have not by themselves any right to a settlement.

A married woman's equitable separate property is property which is so settled upon her that courts of equity recognize it during her coverture as her own, unaffected by her husband's marital rights. It is an inseparable incident to a separate estate in the wife that the husband has no control or dominion over it, and the cases all agree, that while no particular form of words is necessary to the creation of a separate estate, yet there must appear upon the face of the instrument a clear and manifest intention to exclude the marital rights of the husband. A trust created for the separate use of the wife may be declared, either in express terms, or it may be inferred from the manner in which the property is to be enjoyed, or the directions given concerning its management. In the wife's ordinary equitable estates all the marital rights of the husband exist.

In order that this estate of the wife may exist, the sole requisite is that the terms of the settlement show that it was intended by the settlor that in the property in question the husband in question should have no marriage rights. No technical words are necessary to show this intent. Technical words, it is true, are not necessary to create a separate estate in the wife, but adequate language must be used, in making the gift, to manifest a decided intention to transfer a separate interest. It is not now necessary to name a trustee. With reference to the wife's powers over her equitable estate, two views

have prevailed. (1) That she has all the powers of a feme sole, save those denied her by the terms of the settlement. This rule prevails in England, Alabama, Arkansas, California, Connecticut, Illinois, Kentucky, Maryland, Missouri, New Jersey, New York, Tennessee, Texas, Virginia, West Virginia and Wisconsin. (2) That she has no powers save those given her by the terms of the settlement. This rule prevails in Florida, Mississippi, North Carolina, Pennsylvania, Rhode Island and South Carolina.

In some states, by statute, a wife has dower in leasehold property and other personalty, but at common law the wife has, during coverture, no right in her husband's personalty, except her right to have maintenance or alimony out of it, in a proper case and her right to dispose of it, if abandoned. He may give it away and do with it as he pleases, if his act takes effect during coverture. But in most states he cannot leave it all away from her by will; she has her two-thirds.

By an agreement before marriage, husband and wife may vary or wholly waive their rights in each other's property.

When two tenants in common, or joint tenants marry, the character of the estate held by them is not changed, though each has, in the interests of the other, the same estate as he or she would if the other were a tenant in common, or a joint tenant with some third party, instead of with him or her.

Since, at common law, any personalty of the wife belonged to her husband, if he reduced it to his possession during coverture, there is no reason why this should not apply to property in which he is partly interested. And yet a bequest to a husband and wife and a third party equally gave husband and wife only one share, a moiety; and any

chose in action standing in their joint names went absolutely to the survivor.

Husband and wife are, at common law, one person, so that when realty or personalty vests in them both equally with a third party, they take together but one share a moiety, and the third party takes the other moiety. That moiety or in case the whole property vests in them alone, they take as one person,—they take but one estate as a corporation would take. In the case of realty, both are seised of the whole, and each being thus seised of the entirety, they are called tenants by the entirety, and the estate is an estate by entireties. In the case of personalty, there is strictly no tenancy by the entirety, because personal property is not subject to estates at common law, and the husband has the absolute right to the wife's chattels, which right his part ownership of the chattels would not interfere with, but entireties are said to exist in chattels real. In Kentucky, Maryland, Iowa and New Hampshire, statutes have changed this estate; and in Ohio and Connecticut it has never been recognized.

Estates by entireties may be created by will, by instrument of gift or purchase, and even by inheritance. Each tenant is seized of the whole, the estate is inseparable—cannot be partitioned; neither husband nor wife can alone affect the inheritance,—the survivor's right to the whole. It is the better view that married women's separate property acts do not destroy an estate by entireties. In Arkansas, Indiana, Maryland, Michigan, Mississippi, Missouri, New York, Pennsylvania and Wisconsin, it is held that separate property acts do not destroy them. But in England, Alabama, Illinois, Iowa and New Hampshire it is, on the other hand, held that estates by entireties depend upon the unity

of husband and wife, and that the separate property acts have destroyed these unities as far as the property is concerned, and that with the existence of this unity estates by entirety have ceased to exist. An absolute divorce renders husband and wife tenants in common in their estates, the estate by the entirety being thereby destroyed.

CHAPTER VI.

MARRIED WOMEN

A wife was under the power and authority of her husband at common law; her legal identity was merged in his; and she had of herself no separate legal existence in the eye of the law. Therefore, all her contracts were absolutely void; her torts and crimes committed in her husband's presence were his rather than hers, and she could neither sue nor be sued without him. The inconvenience of the contract application of this silly fiction gave rise to exceptions.

When a husband has abjured the realm under the old common law, or has permanently abandoned his wife to the state under the present law, she has most of the capacities of the feme sole; she may make contracts, wills, sue and be sued.

The woman has still a husband, and is not, therefore, a feme sole after a divorce a mensa et thoro; and so in England she is held to remain under all the disabilities of coverture, but in the United States a different rule has been adopted and she may generally contract, sue and be sued as if unmarried.

When one is outlawed, banished, or imprisoned for life, he is civilly dead, and his wife has the capacity of a feme sole. Thus, she may contract, make a will, sue and be sued as if unmarried.

The insanity, infancy, or other incapacity of a husband, as a general rule, does not affect the personal status of his wife. There seem to be no cases just on this point, but the proposition is an easy in-

ference from the well known principles on this subject. A deed by an infant husband and his wife of her property is voidable by him, and if avoided by him, it is void as to her also. A husband's mere sickness or inability does not give his wife power to act for him, except so far as this is necessary for the support of his family or the preservation of his property; and there can be no implication of her agency in fact if he is insane. But if he is insane and confined in an asylum out of the State, she has the capacity of a feme sole, just as if he were civilly dead. A statute which provides that when from drunkenness, from profligacy or other cause, the husband fails to provide for his wife, she may act as if sole, does not include insanity, but only some cause within the husband's control.

At common law a wife could act fully as agent, executrix and trustee, as will hereinafter be shown.

The fiction of the non-existence of wives, in the eye of the law resulted in great inconvenience and courts of equity from the earliest days recognized the legal existence of wives with respect to property settled on them to their sole and separate use; so that with respect to such property married women have always had many of the capacities of unmarried women. But these capacities were limited to the aforesaid property; a wife has no greater personal capacity in equity than at law.

We must look to statutes for the most part, in order to determine the status of married women. For in all the states, the common law system of coverture has been more or less destroyed by legislation. The main difficulty lies in determining how far a particular statute has modified the pre-existing common law.

When a party labors under several disabilities, each must be considered by itself, and must be given

as great effect as if it existed by itself. In the absence of express legislation, neither a man nor a woman attains full age by marriage; a marriage, however, with the parents' consent, emancipates an infant. A statute which enables a married woman to make certain contracts if of "full age" means full age generally, not full age for marrying. The husband of an infant has the same marital rights and liabilities as the husband of an adult. Upon the marriage of an adult with a ward under age, the rights and powers of the guardian cease, both as respects her person and her estate, and the husband acquires the same rights and incurs the same obligations which he acquires and incurs in case his wife is of age. Infancy and coverture are separate and distinct disabilities, and each must be considered by itself. They may exist separately, or they may co-exist. When they co-exist, the removal of one in no way is the removal of the other. And the same applies to insanity and coverture. The deed of an infant married woman being voidable for infancy, the question arises whether it can be voided or confirmed while the disability of coverture continues. The general rule at common law, and even under modern acts (since the coercion of the husband over the wife is not destroyed) is that the wife cannot confirm the deed, excepting by a new deed executed in accordance with the married woman's acts after attaining full age, until both of her disabilities have been removed; that is to say, until she has attained full age and coverture has been terminated by death or divorce. A statute which enables a woman to confirm her deeds during coverture does not compel her to do so. But as to statutory separate property a married woman may be estopped; and it seems that by her conduct during coverture after attaining full age, she may estop herself from void-

ing her deed after the termination of coverture. Neither can she, it is said, during coverture disaffirm her deed by any act in pais; but a husband can disaffirm a deed of his wife in which he as an infant is joined. Still, by making another conveyance during coverture, or by bringing suit for the land, she may disaffirm her deeds; and under modern statutes it is said she may disaffirm her deeds generally during coverture. She need not restore the consideration; but she must not delay her avoidance beyond a reasonable time after the cessation of coverture. A statute validating the deeds of infant married women is not retrospective in its operation.

The will of a married woman at common law was, generally, a mere nullity, because by marriage her legal existence was merged in that of her husband; she had no separate disposing power; she was not sui juris; she was not a free agent, but was under the power and control of her husband; her incapacity depended also on the fact that she had nothing to dispose of, it is said. The husband acquires by the marriage the right to use and occupy, during coverture, lands belonging to the wife, whether her title be governed by the "woman's law" or not. The personal property of the wife in her possession at the time of her marriage vests absolutely and immediately in the husband, who can dispose of it as he pleases, and on his death it goes to his representatives. The disability of coverture in respect to liens differs materially from that of infancy, idiocy, or lunacy, and though it be removed, any other disability will remain.

A married woman at common law who, owing to peculiar circumstances, had the capacities of a feme sole, could make a will, as where her husband was civilly dead, being, for example, banished for life, but the adultery and desertion of her husband

did not enable her to make a will. So when she was acting in a representative capacity, for example, as executrix, she could make a will, or where she was acting for and in the place of another, as where she made a will of personalty with her husband's consent, or under a power. If there is no question as to the right of a married woman to execute a power of any kind, the law prescribes no particular ceremonies to be observed in the execution of a power; but the terms of the power may direct it to be executed by a note in writing, or by will or deed, or may prescribe any ceremonies which the will or caprice of the party creating it may think proper, all of which must be complied with, however unessential or unimportant they may appear to be in themselves. A married woman may will realty even, under a power given by a mere agreement between herself and her husband before marriage, and when she acts under a power the whole doctrine of disability by coverture is eliminated. In executing a power she need not conform to the requirements of married women's statutes, nor have the consent or joinder of her husband; she may execute it in favor of her husband, and her mode of executing it and her right to do so are unaffected by married women's enabling acts. She may revoke a will made under a power by another subsequent will; but any paper which is to take effect as a will must be probated.

Since courts of equity have long recognized the separate existence and separate property of married women, the reasons for the incapacity to will under the common law do not exist in equity and married women's wills of equitable and separate estate are very common.

General statutes as to wills do not affect the capacity of married women. A statute authorizing

a wife to will generally, as has been seen, does not authorize a will to her husband; but the soundness of this really is questionable. A statute prohibiting a husband from witnessing his wife's will does not render it unlawful for him to be present when she executes it.

In most of the states the Separate Property Acts provide for the willing of separate property.

A distinction must be made between the validity and the operation of a married woman's will. At common law she could not will; first, because she had no legal capacity, and second, because during her husband's lifetime she had no property for a will to act upon; and on the one hand we find her wills sustained when she has no capacity, as where she disposes of her husband's property, whether held in her right, or in his own, with his consent, while, on the other hand, we find a perfectly valid will inoperative as to certain property, for example, to property which passes to her by survivorship. It would seem that when her power to will is given by the instrument or statute which secures the property to her separate use, she can will the whole of the same and defeat the marital rights of her husband; but that when her incapacity to will is removed by statute generally, her will operates only so far as it does not conflict with the marital rights of her husband. In probating a married woman's will, its operation must be limited to the kinds of property which it is in her power to dispose of.

A husband cannot by his consent give his wife any personal capacity to make a will, for the status of married women depends on the law and not on contract; the most his consent can do is to enable her to dispose by will of property which belongs to him, either in his own right or in her right, as her husband, and it seems that this applies only to per-

sonal property. The assent is generally revocable by the husband at pleasure, until the will is probated; it is revoked by his death, and he must, therefore, survive her to render the will good. Generally under the statutes the husband's assent is not necessary for any purpose.

The principles applicable to wills of married women are generally applicable to their gifts causa mortis. A wife may make a donatio mortis causa of her equitable separate estate, or of any of her personalty with her husband's consent, and she may make a gift to her husband himself. But she cannot, of course, give away what she has previously disposed of.

The same capacity is required to revoke a will as to execute it, and it is because a married woman cannot revoke a will at common law that marriage itself works a revocation. Any valid will made during coverture revokes all other wills, so far as they are inconsistent with it. If she makes a will she may revoke one. A will made before marriage by a woman was at common law revoked by her marriage. In many states the rule that marriage revokes any will is adopted by statute, and where this rule was adopted by statute only as to married women, statutes afterwards passed increasing the powers and capacity of married women do not repeal it.

The death of a husband will not revive a will made before marriage and revoked by marriage; but there must be a republication. A valid will made during coverture remains valid and does not have to be republished when the marriage is dissolved. An invalid will made during coverture does not become valid when the husband dies; the wife's intention to adhere thereto will not suffice; nothing can give it efficacy save a republication. A

republication means a re-execution, with all the formalities required by law. A codicil duly executed is a republication.

Wills of real estate are governed by the law of the state where the lands lie; wills of personalty by the law of the testator's domicile. The validity and effect of a will of a married woman depends on the law which exists at the time of her death, though its validity had been held to depend on the law existing at the time of its execution.

The law of contracts requires that there shall be at least two parties to every contract, and that the parties shall be capable of giving their consent. In the first of these rules, since at common law husband and wife are one person, lies the main reason for the invalidity of contracts between them; in the second, since the wife is said at common law to have no will of her own, but to be under the power and control of the husband, lies the reason for the invalidity of all contracts of married women. As the unity of husband and wife has been gradually encroached upon in equity and by statute, and as the disabilities of married women have been gradually directly and indirectly removed, the number of contracts which a married woman can make has been gradually increasing. But legislation has been so dumb and blind, and legal decisions so inconsistent, that the present state of the law of contracts of married women is most confused. The word "contract" as used in this connection includes all transactions between consenting parties, although deeds are particularly discussed hereinafter.

At common law, generally, all contracts, agreements, covenants, promises, and representations of married women were absolutely null and void. The grounds of their invalidity, as we have seen, were that a married woman had no legal ex-

istence, being merged in her husband; that she had no separate existence, and that she had no consenting capacity, as she was under the power and control of her husband, and his wish was her law. The common law rule, although for the greater part done away with by equity and by statute, still so far exists that any capacity of a married woman to contract is regarded as exceptional, and the grounds thereof must be alleged and proved by the one setting it up. Married women are still prima facie unable to contract at all.

Under certain circumstances, at common law married women had the capacities of unmarried women, and could, therefore, contract as feme sole. This was the case when the husband was an alien residing abroad, or when he had been banished, or had abjured the realm, or was civilly dead. In the United States a permanent departure from the state, and renunciation of his married rights by a husband, invests his wife with the capacities of a feme sole, though whether under such circumstances she can make a valid deed seems to be disputed. In Texas, mere separation, if permanent, is sufficient to produce this result. The true rule seems to be that neither departure from the state alone nor separation alone is sufficient; but the husband must have renounced his marital rights and put himself permanently beyond the processes of the courts of the state.

Independently of statute, a married woman's personal contracts are no more binding in equity than they are at law; as to her person and her general property her contracts are absolutely void, so that even her deed, if not properly executed at law, cannot be reaffirmed, corrected, or enforced in equity. But equity recognizes the separate property and existence of married women, in most states

and a wife is, with respect to such property, treated as a feme sole and her contracts relating to the latter are enforced in a proceeding in rem. Thus, her contract to sell her equitable separate estate is valid, and even if not enforceable against her specifically, if she has received the purchase money, the property is liable for its repayment; and a contract, in consideration of a loan, to pay it back, and to give a mortgage for it on her equitable separate estate, may be enforced as an equitable mortgage. That is to say, any contract charging her equitable separate property for a payment of money may be enforced against said property and such contracts may be made through any one, including her husband, as her agent. It is generally held that her equitable separate property is not liable unless the wife has the right of disposing of it; thus, when she has only a life estate the reversion is not liable; when she cannot dispose of the whole of her land, only the rents and profits are liable; and when she cannot dispose of it at all, it is not liable at all. It is not liable when no credit is given to it, as when the credit is given to the husband; and in the case of household expenses the credit is presumed to have been given to the husband; it is not liable when there is no consideration; it is not liable if expressly charged. As to this, of course, the intention need not be expressed in the contract, or in writing. It is liable if impliedly charged. The intent to charge may, except in North Carolina, be proved by special evidence. In many courts, to prevent the implication of a fraudulent intent in the married woman at the time she contracted her debts not to pay them, the law raises a presumption that she intended to pay them in the only way possible, namely, out of her separate property; and such courts hold her property prima facie liable on all her contracts, on

the doctrine of implied intent. This presumption may be rebutted by showing that neither party had in mind payment out of her estate. Very rarely, however, is this liability said to be independent of expressed or implied intent to charge, as it is in Virginia.

It is liable on contracts in relation to it, or on the faith and credit of it.

But the only satisfactory way of determining the law in each particular state is to examine the statutes and decisions thereof.

The present capacity of married women to contract depends largely on statutes; and the effect of statutes, general and special, on the common law rules forms a most important subject. Separate property acts do not enable a married woman to make personal contracts—this is universally admitted.

But three classes of her contracts have been recognized as binding on her statutory separate property: (1) contracts which would bind her equitable separate property; (2) contracts which are expressly authorized by the statute—as when a statute empowers her to make contracts relating to or with reference to her property; (3) contracts which are impliedly authorized by statute—contracts without the capacity for making which she could not possess, use and enjoy her property as it was intended, under the statute, that she should.

A married woman in California is incapable of contracting a personal obligation except in cases provided by statute.

The common law disability has not been removed in the District of Columbia; but a married woman may contract to repair her house,—to put it into rentable condition.

Though the wife may conduct a mercantile

business in Florida and the husband may act as agent for her in that business, yet she cannot make a contract herself, or by him as agent, on which she will be personally liable.

In Georgia, a married woman is not liable on her note given for money borrowed to pay a premium due by the husband upon the policy of insurance on his life, where it is not shown that the policy was for her benefit alone.

In Illinois the power of the wife under the enabling laws of the State to engage in trade is quite extensive.

In Indiana a married woman may execute a promissory note for property purchased by her.

In Kentucky a note given by a married woman, not for necessaries for herself and family, and for which credit was not given her, is void.

In Maryland a bond executed by a feme covert alone without the joinder of her husband, is void and no action can be maintained upon it, either during coverture or afterward.

In Massachusetts a married woman who endorses bank promissory notes at her husband's request, for him to fill up and use, which afterward and in her absence he fills up and negotiates for value at a bank, is liable to the bank as endorser, under the Massachusetts statutes, which give her the non-restrictive right to contract except with her husband.

In Michigan a married woman can make an executory contract that is not directly connected with her estate. But she may render herself liable for things bought by her for family use; yet she is not liable upon a contract for the board of herself and husband; she cannot make a valid contract for the erection of a building upon the joint property of herself and husband, but can contract only with

reference to her sole or separate property. A contract in writing to bind her must have been made on behalf of her sole property. The statutes do not authorize a wife to become personally liable on an executory promise except concerning her separate estate.

In Minnesota, the capacity of married women to be bound and estopped by their contract is incident to their enlarged power to deal with others under Minnesota statutes.

The statutes of Mississippi in relation to married women have not relieved a wife from common law disabilities to make contracts; unless she has a separate estate she is subject, as to her contracts, to the disability of coverture; and a personal judgment against a married woman in Mississippi, in an action against her on her promissory note, is a nullity.

Under the revised statutes of Missouri a married woman may act as feme sole as to her separate property, and may make contracts for the purchase of personal property with her separate means.

Under the New Jersey revision a wife may contract to sell her real estate, and specific performance thereof will be decreed, after her husband's death, against one purchasing with knowledge thereof.

In New York a married woman may carry on business and may make contracts in the prosecution thereof; and in the course of her separate business she can make negotiable paper which will be governed by the law merchant. Her contracts may be either expressed or implied and may be made either personally or by agent, and when within the statute they will charge her separate estate. As to all contracts relating to her separate estate a married woman under the laws of New York stands at law, under the married woman's acts, on the same footing as if unmarried.

As to the power of a wife in North Carolina to make contracts which will charge her separate estate, see case of Matthews vs. Murchison, 17 Federal Reporter, page 760.

In Ohio the right to dispose of property which attaches to the estate of a married woman is largely regulated by statute. Her separate property is not liable for her general engagements in the absence of a contract valid in law to bind the same. Except so far as capacity has been given to her by statute to bind herself by her contracts they are void. She may charge her separate estate at least to the extent that such liability may be incurred for its benefit.

In Pennsylvania, the wife has only such power over her personal property as is conferred by statute. All contracts made by the wife concerning her separate estate, either for labor or materials for improving the same, are subject to her disabilities as a feme covert, except where a case is made out for the court to charge her separate estate. Under the Pennsylvania act, February 29, 1872, a married woman can make a valid judgment note for a sewing machine purchased for her own use. Under the Pennsylvania act of June 3, 1887, known as the Married Person's Property Act, a married woman may confess judgment, or bind herself or her estate by contract, for three purposes, viz.: where she engages in trade or business, in the management of her separate estate, and for necessaries; but she cannot bind her estate jointly as a feme sole. She cannot enter into a valid agreement with a third person, without the consent of her husband, transferring to a person a sum of money in consideration of his obligating himself to pay her an annuity out of such sum during her natural life; and, if she does so, it will be presumed that such third person knew that she was acting ultra vires.

Under the South Carolina law, a married woman cannot execute a valid contract of suretyship. A note given by a married woman for money borrowed for her own use is valid under South Carolina general statutes; and a note given by her for money expended on account of her children at her request is valid.

In Wisconsin, married women have not been vested by statute with general power to bind themselves or their separate estates by the ordinary contract of endorsement of a note.

The foregoing references will give an adequate idea of the general trend of the statutory laws of the various states. Local statutes, however, should always be consulted, as it is almost impossible to lay down rules applicable to all the states. When a separate property act gives a married woman capacity to make certain specified contracts with respect to her property, or to change or encumber it only by contract executed with certain formalities, it impliedly restrains her from making any others, or any, without such formalities, even in equity; but the fact that courts of law imply from the terms of a statute a limited capacity to contract, does not necessarily prevent courts of equity from recognizing some further capacity. And, though some courts have taken, as it is believed, the true ground, that equity has nothing to do with statutory separate property, the majority have held that her statutory estate is bound by her contracts in equity precisely as it would have been had it been created by a deed to her sole and separate use instead of by a statute. Whether a particular contract is binding on particular statutory separate estate depends on the rule which would determine in the state where it was made, whether the said contract would be binding on an equitable estate. Thus, in New Jer-

sey the contract must be beneficial to her, or must be an express charge; in Kansas, any contract is irrebuttably presumed to have been intended as a charge and be binding, etc. Two limitations to this liability have been recognized: (1) she cannot charge unless she can convey—a rule which has been questioned, but which prevails as to her equitable separate estate. (2) If her husband's consent to her conveyances is required, any contract of hers to be a charge must be made with his consent—a rule also questioned. There are cases, as suggested above, which deem charges as direct conveyances and will not recognize them unless executed with all the formalities required of a conveyance. A power to convey always includes a power to charge.

When the separate property act authorizes a married woman to make contracts "relating to" or "with respect to" or "with reference to" her separate property, the question is, what contracts do so relate, etc.? Whether a contract for the purchase money of certain property is a contract relating to that property is disputed. But contracts for the cultivation, improving, stocking, to supply with tools, or with work horses, of her separate farm, are contracts relating thereto; so is a contract for furniture for her house; but not a contract for supplies for the family, or for the purchase of a saddle horse. So a contract providing for damages for an injury to her property is a contract with reference thereto. When the wife's capacity to contract with reference to her separate property is implied from her capacity to hold, use and enjoy the same, as being involved therein, the question is, what contracts are necessary and proper to render her tenure, use and enjoyment of the property as full and beneficial as was intended; whether, when she may acquire by purchase, she may buy on credit, is disputed; but if

she may trade, she may buy and bill the goods on credit, and may make all contracts in the usual course of business. If she may earn for her own use, she may buy a sewing machine to do her sewing, or a piano to give her lessons on. She may employ counsel to litigate her rights to her property; she may employ servants and laborers thereon; she may lease it, make contracts for its cultivation, and repair, and for disposing of its produce. Whatever is essential to make its use beneficial, she may do. These contracts, it must be remembered, are not binding on her personally, but they are enforced against her property, in some states by a suit at law, in others by a proceeding in equity.

General statutes relating to contracts, but not expressly referring to married women, do not affect the validity of married women's contracts, but apply to them only so far as they are valid under other statutes. To illustrate:—A statute providing that all deeds shall be valid between the parties though not recorded, would not render the deed of a married woman valid; a statute providing for the giving of a replevin bond does not enable a married woman plaintiff to give such a bond; a statute relating to auction bids would not make the bid of a married woman valid; general insolvent laws have been held inapplicable to married women; a statute requiring the officer to certify that the party executing a deed was known to him does not apply to married women's deeds executed under another special act not requiring this. On the other hand, under the National Bank Acts which do not mention married women, they are liable for assessment on their stock; and under statutes defining liability of purchasers at mortgage sales without referring to married woman, they have been held bound.

Statutes which secure to a married woman

the separate use and enjoyment of her property, and which either do not refer to her contracts at all, or authorize contracts "relating to," or "with reference to" such property, do not enable her to contract generally, but only in connection with such property, and there are three classes of contracts which may be authorized by these statutes, to wit:—(1) contracts binding the property, in equity, as if it were equitable separate property; (2) contracts falling within the clauses expressly authorized by the words "with reference to," and (3) contracts necessary to the separate use and enjoyment of the property as secured by the statute.

A woman's contracts which would be binding on her equitable separate property in equity are valid as against her statutory separate property in the same way.

A married woman is not, with respect to her statutory separate property, a feme sole. She has by implication the capacity to make such contracts, and any others, which are necessary to the exercise of the capacities, or the enjoyment of the rights, expressly given her by the statute.

When the statute authorizes a married woman to contract "with reference to," or "with respect to," her separate property, her contracts to be valid must be with reference to or with respect to her said property.

The following contracts relate to, concern, refer to, and respect a married woman's separate property, to wit: contracts for the direct benefit of the same; for selling the property; for cultivating it; for improving it; for stocking it; for fencing and repairing it; for supplying it with laborers and with tools; also a covenant for a title in a deed of such property; also an agreement for the sale of the same, but not an agreement for the purchase of

such property, or the purchase of furniture for her separate house; or of a horse for her separate farm. A contract to buy a horse for pleasure riding is not a contract with reference to her separate property, nor is one for supplies for the family, nor one by which money is borrowed to buy property.

Statutes expressly authorizing or prohibiting certain specified contracts are strictly construed, and respectively neither authorize nor prohibit any contracts not specified; but statutes expressly authorizing specific contracts may, by implication, prohibit or authorize, and contracts expressly prohibiting certain contracts may, by implication, authorize others. Under a statute which authorizes one kind of contract no other can be made. So that when a married woman is authorized to dispose of her property by sale, she cannot dispose of it by gift. The only capacities implied are those which are necessarily incident to rights or capacities expressly given.

Likewise statutes prohibiting certain contracts are directly interpreted, so that a prohibition against contracts between husband and wife will not apply to contracts of the wife as authorized by her husband. On the other hand, when a married woman is authorized to make certain contracts with certain formalities, she is impliedly restrained from making any others. And a prohibition of certain contracts in a statute may make clear the intention of the legislature to authorize all other contracts of the class to which the prohibited contract belongs; thus, under a statute authorizing a married woman to acquire property, provided that no acquisition from her husband in prejudice of the rights of his creditors shall be valid, authorizes her to acquire from her husband in all cases when the rights of his creditors are not prejudiced.

Under a statute expressly enabling a married woman to contract as if unmarried, she may make contracts generally, entirely unaffected by her coverture; when a statute says that a married woman may contract as if unmarried, it is presumed to mean, literally and fully, but it is doubtful whether she may make contracts directly with her husband, as has been seen in the chapter on "Husband and Wife."

If a statute which enables a married woman to contract requires her contracts to be executed in a certain way, this requirement must be substantially complied with to give her contracts any validity. This rule will be discussed fully later. But if she has the capacity to contract independently of the statute which requires the formalities, a contract not complying therewith may still be valid.

The capacity of a married woman to contract personally, or as to movables, depends on the law of the place where the contract is made; to contract as to immovables, on the law of the place where they lie.

The validity of a contract, and the rights of the parties thereunder, depend upon the law existing at the time it is made.

Marriage suspends the remedies against a married woman on her ante-nuptial contracts, or rather it makes her husband liable for them with her and a judgment recovered on such a contract against husband and wife can be satisfied out of the property of either of them. Her husband's liability ceases on her death or on divorce, while on divorce or his death her full liability revives, and the same is said to be the effect of any event which gives her the powers of a feme sole, and her promise during coverture to pay an ante-nuptial debt does not take such debt out of the statute of limitations, being

itself void. In many states the husband's liability for his wife's ante-nuptial debts has been destroyed by statute, and her full liability on the same has been declared.

It involves some difficult questions to determine what is required of a woman who has made a contract while under the disabilities of coverture to confirm it.

The mere fact that a wife survives her husband does not give any efficacy to her contracts made during coverture, though it has been held that a contract enforceable against her during coverture only in equity could be enforced at law against her after coverture; but her liability on her ante-nuptial contracts revives, as her contracts made during coverture are void and if voidable they cannot be ratified, and therefore, according to the better view, her mere promise to perform them made after coverture (after divorce or death of husband) is without consideration and void; but in some states the moral consideration is deemed sufficient to support and render valid such a promise, and in others the courts have expressly declined to decide this point.

Whatever be the opinion as to the effect of an express promise, there is no doubt that a mere recognition of the contract gives it no new validity. A contract enforceable in equity is, however, ample consideration for an express promise; so is the surrender of a note void as to her, but binding on others; so is a note given for an ante-nuptial debt.

A married woman cannot set up her invalid debt by parol, but she can confirm her easements and debts by reacknowledgment and recording, by estoppel, and in Iowa, may ratify her debt of the homestead as if she had never been married. So by

bringing suit on an invalid contract she confirms it by matter of record.

At common law a married woman had no legal existence and could not, therefore, have any legal representatives; but rather her legal existence was merged in that of her husband, and he was for all purposes her agent in law; so her ante-nuptial appointment of agent was revoked by her marriage. Her capacity to contract through an agent is now co-extensive with her capacity to contract directly: thus, she cannot make a contract through an agent which she could not make herself, as a contract with respect to her property not separate; and she can make through an agent such contracts as she could make herself, as contracts charging her separate estate, or in the course of her business. The position of her husband as her agent, her appointment of attorneys-at-law, and her powers of attorney, are elsewhere discussed.

In considering the contracts of a married woman it is important to distinguish between her personal contracts, which bind her personally, and her contracts with reference to her separate property, which are binding thereupon. The distinction originated in equity, which recognized her separate ownership of property settled to her sole and separate use, and her capacity to charge the same with her contracts. Said contracts were not enforceable against her personally, but only against the property which became a kind of artificial person, in a proceeding in rem. And so, under statutes creating statutory separate estate, the courts continued to hold that her contracts to be valid should be with reference to her estate, and that mere personal contracts were void unless expressly authorized.

A promise will not be implied by law when the law would not recognize an express promise;

if she occupies premises, however, the law raises an implied promise to pay rent. If she orders materials, the law implies a contract to pay for them. But if she buys necessaries, the implied promise is one of the husband, for he is liable therefor. And if she receives money claimed by another, there is no implied promise to pay it back.

A married woman cannot as a general rule contract to buy or sell property, because a contract to buy is a mere personal contract, and a contract to sell is not one of the modes usually specified for the disposition of married women's separate property. Still an agreement to sell is a contract with reference to the property, and may be valid as such. But with a married woman's actual purchases and sales it is different. It is not one of her privileges to buy without paying, and therefore where she may acquire by purchase she may buy on credit, and be bound for the purchase money. A promise to pay for separate property is a contract with respect to her separate property. So if she follows all modes prescribed she may sell her property, and is bound by her acceptance of any consideration. If her sale is void and the purchaser has paid her the purchase money, it is generally settled that he must bear the loss. She may recover the property without restoring the purchase money; though in some cases this has been denied.

The promissory note of a married woman was void at common law; a mortgage for the sole purpose of securing it was void; if made jointly with another it was void as to her, but valid as to her co-promissor; so as to a surety, it was equally void in the hands of bona fide assignees for value without notice. By accepting a note from a married woman purchaser a vendor did not lose his lien. Now, a party endeavoring to enforce a promissory note

must show that it falls within some equitable or statutory exception; in Michigan, for example, it must be shown that it was for something connected with her separate estate; in Louisiana, that it benefitted her.

Under an act enabling a married woman to contract as if sole, she may make a promissory note, and validly endorse a note of her husband's firm, and execute a note in blank, and be liable, though her husband join with her and has been adjudged bankrupt.

Under an act enabling her to contract with reference to her separate property, a note with reference to something else is not valid.

A release is a contract, and works as an estoppel, while a receipt is a mere statement—or a mere admission of payment, and not conclusive. At common law she could give neither release nor receipt; as her legal existence was gone, her present property rights vested in her husband.

At common law a married woman could, of course, not lease property, and in her leaseholds her husband had very full rights.

When she can lease by statute expressly, she is liable for the rent at will. A lease is, in fact, the purchase of a term, and a married woman is liable for the rent just as she would be for the purchase money. If she can lease, she is liable on an implied promise for the use and occupation of the premises which she holds after the expiration of the lease, even though her husband and family are living with her.

For repairs on her property, at common law, she was in no way liable. And even for repairs on her equitable separate estate she was liable only if she made the contract in such a way as to bind her said estate. From her mere knowledge that repairs

were being made on her property at her husband's request, no promise on her part to pay therefor can be implied. But when she is collecting the rents of her separate property, and allows out of them for repairs, she is bound. A contract for repairs is beneficial to her estate, and is a contract with reference thereto, and is a contract which, owing to her ownership of her separate property, she may make by implication.

From a purchase by the wife of family supplies, a promise to pay on the part of the husband and not of the wife is implied. If she expressly contracts to pay therefor, she is liable only if she is liable generally on her contracts, or expressly charges her estate. For a purchase of family necessaries is not of itself a contract with reference to her separate estate, nor is it a contract which she can make by virtue of her powers implied from her ownership of her property. In some states her property is made jointly liable with her husband's for all family supplies, but it is a liability of her property and not of herself.

At common law a married woman could not be a surety because she could not contract at all. In equity, though, in most states a contract made with intent to charge equitable separate property therewith is enforceable, even if made for the benefit of another. In some states such contracts are enforceable only if beneficial to the woman or the property, and surety contracts are void. But the general rule is that all deeds, mortgages, etcetera, of a married woman, made in accordance with the law, are valid, no matter whom they benefit; for a general power or enabling act does not limit the married woman to contract for her benefit, but some statutes expressly accept suretyship contracts, and under these a contract of a married woman jointly with another for

his debt is void as to her; nor is a contract between her and her husband any consideration in favor of the payee for her endorsement of her husband's note. And a suretyship contract is not a contract with reference to her separate property, unless it is charged thereon; nor is it a contract which she is empowered to make by implication from her power to hold and enjoy. The rules are the same whether the wife becomes surety for her husband or for a stranger. At common law a married woman had no legal existence and no present property rights, and therefore her deed, whether of power or her own property was, like her other contracts, a mere nullity. She could be debarred of her power or divested of her property only by what is known as "fine and common recovery." Fines and common recoveries have never existed in this country, and do not now exist anywhere, but statutes have taken their places. In some states, independently of statute, the joint deed of husband and wife has always been recognized as if authorized by the common law. Whenever a wife held the position of an unmarried woman, as when her husband was civilly dead or had abandoned the realm, or as to her equitable property, she could deed her own property as if unmarried.

Statutes have been passed everywhere relative to married women's deeds of dower, of the reversionary interest in her realty, and of her statutory separate estate. These are statutes expressly referring to married women, as the general statutes do not apply to their deeds, unless they deed as if unmarried. The general rule is that a married woman can convey her property except her equitable separate estate, only in the mode prescribed by statute. The deed must be guaranteed and cer-

tified substantially as required by the statutes, or it is mere waste paper.

When a married woman has the capacity to deed her equitable separate property she executes the deed. Unless the settlement provides otherwise, as if unmarried, as to whether or not she has the capacity there are three rules: (1) that she has the capacity unless the settlement takes it away; (2) that she has not the capacity unless the settlement gives it; and (3) that she has the capacity to deed away her estate during coverture, but not her reversion. Her equitable property, which is not separate, she must deed as she does her legal estate of the same kind.

The general rule is that a married woman has not capacity to dispose of her statutory separate lands unless it is expressly given by statute. If the statute expressly gives her the power to dispose of her property, but describes some particular mode of its disposition—some particular formalities—the deed must substantially conform with the requirements of the statute or it will be wholly void. If the statute expressly gives her the power of disposition, but names no particular mode of execution, she may execute her deed as if unmarried, and if it is imperfect it may be confirmed, and will be valid in equity just as the imperfect deed of a married woman is.

The husband's joinder in his wife's deed is generally necessary to render it valid and is unnecessary only when she is expressly authorized to deed as if sole or as if unmarried. The joint deed of husband and wife need not be executed at the same time and place; whether he shall join is discretionary with him and he cannot be compelled to join; so it is a personal right which cannot be delegated; nor can he honestly claim compensation for

joining. His joinder is not necessary in his wife's deed of her equitable separate estate, when she has the power to convey as if sole, nor need he join in her deed executed under a special power. Where, by statute, a husband must joint in his wife's deeds, she cannot without him make a good deed in equity, or a good agreement to convey.

When a married woman executes a deed under a power she must directly conform with the terms of the power; she must execute it herself; she would not be bound by another signing her name in her presence, nor by another filling in blanks left by her, and she must acknowledge it in conformity with the power, if the power refers to the mode of acknowledgment.

Although the deed of a married woman be perfect on its face, she may show that in fact it was obtained by fraud or duress, or was improperly executed, and was therefore void.

As to her right to do this as against a party to the fraud, or any party without notice of the defect or fraud, or with notice of such facts as would put him on guard, or on whose behalf the husband has perpetrated a fraud, there is no doubt. And if she in fact never executed the deed, and it is a forgery, she may impeach it as against any one; but if, though she executed the deed improperly, the certificate is perfect, she cannot, it seems, impeach it as against purchasers without notice, it being a general rule, founded on public policy, that defects of execution cannot be alleged against bona fide purchasers or assignees for value if the certificate be perfect; as to them, in such cases, the certificate is conclusive. The officer who made the certificate cannot impeach the same, nor will the unsupported testimony of the wife be sufficient to overcome the certificate. If she acknowledged the signature, she

cannot say she didn't sign the deed; nor can she allege that she didn't read or understand the deed if she had full opportunities for so doing, and alleges no fraudulent concealment; nor can she deny that she assented when she silently did so; her declarations made at the time of the execution are evidence. If she has duly executed the deed, and has left it with her husband, she cannot deny his offer to deliver.

Independently of express statute, a married woman may, where she has over her equitable separate estate the powers of a feme sole, convey it by power of attorney. As to powers of attorney unconnected with the conveyance of land, they gain no validity by the seal and acknowledgment, and their validity is tested as that of other contracts of married women.

At common law, a married woman's antenuptial power of attorney was revoked by her marriage. It is commonly said that a wife's executory contract to make a deed of property is absolutely void, and even her contract to deed property held by her as trustee has been so held. When she has full ownership of her property or may contract generally as a feme sole, however, her agreement to convey is valid. At common law the husband could not by his agreement to convey affect the wife's interest in her lands, though such an agreement bound him.

One may be estopped by a judgment, by a deed, by a contract, or by a tort; and the general rule as to married women is that they can be estopped only by valid judgments or deeds; by contracts only so far as they have the capacity to contract; and only by torts of a kind for which they would be liable. It is clear that a married woman under disabilities cannot be estopped as if she were sui juris,

and the only way of determining in what cases she may be estopped is to ascertain, first, whether the alleged estoppel arises out of a judgment, deed, contract, or tort, and second, whether such judgment, deed, contract, or tort is binding as such on the married woman.

For torts of any kind, except those against the man she marries, committed before marriage, a woman remains liable after her marriage; and her husband is generally liable therefor with her.

For all torts committed by a married woman during coverture, in person, except such as are committed under the coercion of her husband, and such as are intimately connected with her invalid contracts, and such as are committed against her husband, she is liable as fully as if unmarried. Thus, she may sue, and a judgment obtained may be satisfied out of her property, for assault and battery, for trespass, for conversion, for slander, for fraud and false and fraudulent representations connected with her invalid contracts, for burning property, for poisoning geese, and for various other causes. But at common law she could not be held responsible for the act of another as her agent, because she could not contract, and therefore could not appoint an agent; still so far as she may, under statutes, appoint an agent, or act by agent, she may be responsible for agents' torts. When an act complained of was committed in the presence of her husband, the presumption is that it was committed by her through the authority and coercion of her husband, and that she is not liable at all; but this presumption may be rebutted by showing that she actively and voluntarily participated in the wrong, and in such case she is as fully responsible as if her husband had been absent.

In Florida, a married woman is personally liable for her civil torts, including such frauds as do

not grow out of, or are not directly connected with, or a part of, a contract which she has undertaken to make.

In Connecticut, an action for placing obstruction in a highway is maintainable against a wife without joinder of her husband, provided the tort was committed by her without actual coercion by him.

In Indiana, married women are made liable to action for damages for their torts; they take the right to their separate estates with all its incidents, and must use their property with due regard to the rights of others.

In Massachusetts, a husband is liable for a sale of liquor by his wife if near enough to influence her.

In Michigan, the wife is not chargeable with the fraudulent intent of her husband, notwithstanding he may have been her agent in the management of her property and the conduct of her business.

In New Jersey, since the enactment of the statutes empowering married women to transact business independently of their husbands, they are held amenable to the same rules as other persons in reference to what may amount to fraud.

In New York, under the statutes, the husband must be joined as defendant in an action for the tort of the wife (having no relation to her separate property) and is liable for recovery had therein.

Under the statutes of New York, a married woman may have such community of interest with her husband in relation to real estate as will render her liable for his frauds relating to it; and when he, professing to act as her agent, makes false representations although without her knowledge, and she receives the proceeds, she cannot retain the fruits of his fraud.

In Pennsylvania, a husband is no longer liable for torts committed by his wife alone.

In Virginia, where a wife is sued as a sole debtor, under the Virginia Married Woman's Act, April 4, 1877, in an action of unlawful detainer, the consent or non-concurrence of her husband can have no effect whatever.

In Vermont, husband and wife are jointly liable for her tort, but his liability terminates on her death.

For her torts so intimately connected with her invalid contracts that in order to hold her liable for them her invalid contract would have to be substantially enforced, a married woman is not responsible. Thus, she cannot be sued for getting credit by false and fraudulent representations that she is unmarried (but his property she can charge), or for misusing property of which she is a bailee, or for misappropriating money entrusted to her. But if her contract is valid, the rule does not apply; thus, she is liable for false and fraudulent representations made in effecting a valid sale of her separate property.

A married woman continues liable for any crime committed before her marriage, and during coverture may render herself liable to prosecution for any crime as if unmarried, with the following exceptions: (1) she cannot be guilty of conspiracy with her husband; (2) or of larceny for appropriating his goods; (3) she cannot be prosecuted for receiving goods her husband has stolen; (4) or for aiding him to escape detection in a crime he has committed.

To convict a married woman for an act which would be criminal were she unmarried when it was committed, it must affirmatively appear (1) that her husband was absent at the time, for from his

presence coercion is implied; (2) not being present he did not or could not coerce her; (3) or unless it is a crime malum in se (murder, robbery, treason, etc.); or peculiarly feminine (as keeping a bawdy house); or specially covered by a statute expressly referring to married women.

The remedies by and against married women are peculiarly connected with their rights, and in any discussion of married women's statutes the nature of the rights involved must be kept constantly in mind.

The marriage of a woman does not, at common law, destroy her liability on her ante-nuptial contracts, or for her ante-nuptial torts, but simply renders her husband jointly liable with her; nor does she by marriage entirely lose her rights of action, for, though her husband may reduce them to possession, if not so reduced during coverture they survive to her; so that if a suit is pending at the time of the marriage, after marriage the husband has interests to be affected, and the opposing party stands in a new position, and the suit abates. But at present the effect of marriage on pending suits is almost entirely controlled by local statutes. In Alabama, for instance, the suit does not abate, but the marriage is suggested, and the husband is bound; while in Tennessee, the suit abates, it may be revived against her husband, and in case of his death survives against her. It is said a defendant may plead in abatement, or by scire facias have the husband made a party; and if he omits to do this, he cannot allege coverture after judgment; or, if the woman is a defendant, and no plea is entered, the suit may proceed to execution without noticing the marriage, and she may be taken in execution as if sole. Generally speaking, if the husband is a necessary party to a suit brought during coverture, he

should be joined upon his marriage in all his wife's ante-nuptial suits.

At common law, speaking generally, a married woman could neither sue nor be sued unless her husband was joined with her, and this is still a prima facie rule, and the causes which enable her to sue or render her liable to be sued at all, must be alleged and proved.

At common law, the suit so treated is the suit of the husband and he could, as defendant, allow judgment to be entered, or as plaintiff, release the cause of action. He employed the counsel and was liable for the costs.

In equity, independently of statutes, suits of married women, except those for enforcing equity to a settlement and thus concerning her equitable separate estate, are governed by the same rules which control suits at law. Still, in equity neither the husband's bill nor his answer is binding upon her. When applying for her settlement whatever her choses in action, she sues by her next friend, generally making her husband one of the defendants. As to her equitable separate estate, she sues by her next friend and jointly with her trustee, if she has one, making her husband a defendant if his interests in any way conflict; and when she is sued, her trustee (if she has any) should be sued; and she may come in and give a separate answer by her next friend.

In the different states, statutes have so differently changed the procedure in suits of married women that no general statement can be given; the statutes of the state where the particular suit is brought must in each case be consulted.

At common law, on the dissolution of marriage, the joint suit of husband and wife in her right abated; at present, generally the suit will either

abate and have to be revived by her representatives, or may be amended and continued by her or her representatives.

If the joinder of the husband is merely formal, there is usually no abatement. Thus, in case of her husband's death she has her right of action on her chose in action as survivor; and if she dies, he, at common law, prosecutes the suit as survivor or as administrator. Divorce has much the same effect as the husband's death.

Under different laws and circumstances, a married woman's suits have been properly brought in the following modes: (1) by husband and wife jointly; (2) by the wife and her trustee; (3) by the wife through her next friend; and (4) by the wife alone. The first mode was the only one at common law, unless the wife had for some reason the capacity of a feme sole; the second and third were the usual modes of procedure in equity respecting equitable separate property; and the fourth was the mode in which the wife, who on account of her husband's civil death, had the capacities of a feme sole, brought suit at common law and is the usual way in which she sues under modern statutes. Although many statutes giving married women modes of suits unknown at common law have been construed to supersede the common law modes, and to make a suit brought as at common law improper, a statute which enables married women to sue by next friend does not necessarily deprive her of the privilege of proceeding jointly with him as at common law; and in other cases the common law mode has been held not wholly superseded.

Under different laws and circumstances suits have been brought properly against married women in the following modes: (1) jointly with husband;

(2) jointly with trustees; and (3) alone. The first was the invariable mode at common law not only because the husband was jointly liable with the wife on all her contracts and torts, but because he had present and substantial interests in all her property, which might be affected by the suit. The second was the mode when the wife had a trustee of equitable separate property. The third was the mode in which a wife with the capacities of a feme sole was sued, and is the usual mode under the statutes.

The peculiar defence of married women is, of course, the defence of coverture. The fact of coverture in some cases affects the defence of limitations; and the fact that the husband is joined sometimes raises the question as to how far a defence of one will be available for the other. The wife's bankruptcy, for example, discharges both her husband and herself from liability for her debts, while his bankruptcy discharges him alone. As to other defences, there are no special points relating to married women, except so far as the management of the suit is concerned.

If the record in the case of a judgment against a married woman discloses the fact of her coverture, a cause of action on which a married woman might be liable, the joinder of all proper parties, and that the married woman has been duly summoned, and if the subject matter of the suit be one within the jurisdiction of the court, the married woman is bound thereby as if unmarried. If the record discloses the fact of coverture, but not grounds on which a married woman might be liable, the judgment is void, for the court has no jurisdiction to enter it; if though it appears that the grounds of action were such as might render a married woman liable, but that the suit was not properly brought, the defect is cured, and the judgment is valid. If the

record does not disclose the fact of coverture, the married woman may in any proceeding show that owing to her coverture she was not liable at all, but she cannot show that she was liable but was improperly sued. Some cases hold more broadly that in any case where the court had jurisdiction of the parties (by summons or appearance), and of the subject matter, the judgment is valid, and the wife estopped; but the better rule is that a married woman is estopped only when the judgment is valid, and that a judgment on a contract is itself but a contract and not binding on a party not bound by the contract. A void judgment may be enjoined in equity. For example, a personal judgment against a married woman alone is valid, if the cause of action were a contract made by her as a feme sole trader; but a personal judgment against a wife for the balance of a mortgage debt is not valid where she was not personally bound on the mortgage notes; so a judgment on a void note was held absolutely void by the same court which recognized the binding force of a judgment against a married woman by default on a tort committed by her.

On any valid general judgment against husband and wife jointly, execution could formerly be issued against the bodies of them both, and now can be issued against the property of them both except in such cases as those where the property of the wife is exempt by the terms of some statute or deed, or where a statute expressly provides that a husband shall be only a formal party. If the judgment is against the wife alone, her property alone is liable; if the wife is not a party to the suit, her property is not liable at all. The judgment may be by its terms a lien only on her statutory separate estate.

At common law, it must be remembered, a

husband had the absolute right to reduce his wife's choses in action to possession, and was liable with her on all her contracts and for all her torts; and as her legal existence was merged in his, he was the active party in all suits in which they were both joined. She could not appoint an attorney, or release errors, or confess judgment; she could only appear in person and plead her coverture, if that would do her any good. So that in all cases in which the common law procedure has not been superseded, the husband employs counsel and pleads and manages the case for himself and his wife. If they are the plaintiffs, he can settle or dismiss the suit, and is alone liable for the costs; if they are defendants, he may allow the suit to go by default, or suffer judgment to be entered in favor of the plaintiff; and so long as there is no collusion between him and the plaintiff, the wife will be bound by his acts. But his right to act for his wife in this way has been questioned in cases where she was insane. At common law, if a husband neglected to prosecute his wife's rights of action, or released them, his loss was even greater than hers, for he had the immediate right to the enjoyment of them, and if he allowed judgment to be obtained on her ante-nuptial contract or tort, or on her post-nuptial tort (the only causes of action on which a judgment binding on her property could be obtained), the judgment was against himself as well; so that the control of the suit could be safely trusted to his charge. But as his said control of his wife's suit grows out of his substantial ownership of her rights of action, and his equal liability on her obligations, it does not exist where his said rights and obligations do not exist, and disappears as they are removed. He could never, for example, through any suit of his, estop her from claiming property in

which he had no rights by making her a co-complainant, nor could he, by allowing a judgment to be entered against them on a cause of action on which she was not liable, deprive her of her inheritance. He cannot control her suits respecting her equitable or statutory separate estate, unless by her consent and as her agent in fact; nor in such cases can he admit service for her. When he is a mere nominal party, he is entitled to all her defences.

Courts of equity have always recognized the separate existence of wives, and in all suits in which husband and wife are co-complainants or co-defendants, if they have separate and distinct interests, the bill or answer filed by the husband for both is regarded as prima facie the bill or answer of the husband alone, and the wife, if she requests it, is allowed to proceed separately. As equitable separate estate is out of the control of the husband, so are suits relating thereto; and the wife sues by her next friend, if she does not desire to join her husband, simply because the question of her liability for costs might arise if she sued alone. If she does sue by her husband and allows him to act for her, she is bound, but she is otherwise not bound by his declarations, nor are his statements evidence against her. If she files her separate answer by permission of court, she is bound by it; her answer filed without permission may be taken from the files, unless the court allows it nunc pro tunc. As a general rule, under the statutes she has the right to sue and be sued, independently of her husband; and just so far as her choses in action are made her statutory separate property can she control the reduction of them to possession; and just so far as his liability for her torts and contracts has been removed can she control suits against her.

At common law, a married woman could not

appoint an attorney at law; her ante-nuptial appointment was revoked by marriage; she could not appear in a suit by attorney; her plea or answer filed by an attorney was worthless; a judgment entered against her on her warrant of attorney was a nullity; her agreement for alimony made by her attorney was void. In equity and under statutes, speaking generally, she may appoint an attorney at law whenever she has interests separate from her husband, with respect to which she needs legal assistance and advice, or with respect to which she can act by agent generally. She can appoint an attorney to take care of litigation respecting her equitable separate property. Under statutes expressly authorizing her to appoint an attorney or to contract generally, she can of course appoint an attorney. And statutes authorizing her to sue independently of her husband, or to contract with respect to her property, or securing to her the separate enjoyment of her property, by implication, give her the power to appoint an attorney to take charge of such suit or such property. It is necessary to the enjoyment of rights that one should be able to prosecute and defend them. In all cases where she can appoint an attorney, she is bound by his acts as an unmarried woman would be; by his laches; his withdrawal of pleas; his settlement or dismissal of suit (in North Carolina); and she is also bound to compensate him. A statute, however, which gives a married woman the power to appoint an attorney does not of itself destroy the husband's substantial rights in her choses in action.

An attorney who has acted on behalf of a married woman may look for his fees, (1) to her husband, or (2) to her trustee or next friend, or (3) to her property or herself.

Since a wife always sued and was sued jointly

with her husband at common law, and since he employed counsel for them both, the payment of the fees naturally fell upon him. But when he by his conduct made it necessary for her to take proceedings against him, the question arose whether he was not liable for the expenses of the suit as necessaries. It has been held that when a wife sues out a peace warrant against her husband, or defends herself against a similar proceeding by him, or when she sues for a separate maintenance, her legal expenses are necessaries for which her husband is liable. So her expenses in bringing or defending a divorce suit are held to be necessaries in England, Georgia, Iowa, Kansas, and Maryland, while the contrary is the rule in Alabama, Connecticut, Illinois, Indiana, Kentucky, Massachusetts, New Hampshire, Ohio, Tennessee and Vermont. Even where such expenses may be necessaries they are not necessarily so; there must be a reasonable ground for bringing the suit, or some real defence in resisting it. Besides, the courts provide for counsel fees in divorce cases under their jurisdiction to award alimony.

The trustee of a married woman's separate property may employ an attorney; and though himself personally bound to compensate him, he may repay himself out of the estate. So the reason for the existence of a next friend is that there may be a person responsible for the expenses of the suit; and in those cases where a married woman sues by next friend he is liable for the counsel fees.

At common law, as a general rule, a married woman could make no contract at all, and could not appear by attorney in a suit, unless she were appointed by her husband; and therefore her contract to pay counsel fees was absolutely void, and she could not even, according to the better settled rule, ratify such a contract after the dissolution of her

marriage. But if an attorney collected money belonging to her, he could keep a reasonable amount thereof as compensation for his services, though he could not have recovered anything in any kind of suit against her. She could, however, charge her equitable separate estate in equity for fees, just as she could charge it for any other debt of hers, provided she complied with the rule prevailing in the particular state as to the modes in which the charge had to be made; for example, that the contract was made with express reference to her said estate or was for its benefit, and provided that the property sought to be charged was property over which she had the power of disposition. Under a statute authorizing a married woman to contract generally, there is no reason why she should not contract for counsel fees; and when she is authorized to contract with respect to her property, a contract for legal services respecting the same would be valid. So would a similar contract be authorized by implication by a statute securing her property to her separate use and control. So by implication a statute authorizing her to sue and be sued alone, empowers her to employ counsel to represent her. Whether when she may employ counsel she binds herself personally or binds only her property, and whether her obligation is to be enforced in equity or at law, are unsettled questions, contracts for counsel fees being governed in this respect by the same rules as other contracts. When a wife is liable for family expenses, how far counsel fees are a family expense must depend on the particular circumstances of the case.

The use of the words "trade" and "married woman trader" has been vague, and it is necessary, in a discussion of this subject, to bear in mind the

different elements which may be involved in the capacity of a married woman to trade.

At common law, generally, a married woman could make no contract whatever; all her time and labor belonged to her husband, as did all the present enjoyment of her property; she had, in fact, no legal existence apart from her husband; therefore she could not trade at all. If a female trader married, the trade became her husband's, and if she had been trading as partner, the partnership was dissolved by her marriage.

As a married woman could not contract at all by the common law, she could not enter into any kind of engagement or employment on her own account, but all her time, services, wages and earnings of every kind belonged to her husband. Still her husband could agree that she should have her earnings, just as he could invest her with any property of his, and his agreement would be enforced in equity; his agreement, however, gave her no personal capacity, but only the right to collect and keep the wages and rewards of her labors. So by statute, in most states, the wife's earnings are secured to her separate use. These statutes were passed to protect wives from shiftless, improvident and dissipated husbands, and were in form the earliest of the statutes relating to the trade of married women.

Although at common law all the interest, profits, rents and increase of a married woman's property vested in the husband just as the property itself did, except that the rents and profits of real estate vested in him as personalty, she had her separate estate first in equity and then by statute, and the increase of such estate was also separate property; and therefore the products of all investments or uses of her separate property were her separate

property, though such products were partly due to her efforts, and partly to the labor, skill and knowledge of her husband. In a sense, therefore, she could trade with her separate property.

Although when a married woman's earnings or property are secured to her separate use, as above stated, the profits of her business or trade may be her separate property also,—her personal incapacity to enter into trade is not necessarily removed; for equity recognizes her capacities only in connection with her property, and mere property acts do not affect personal status. So that to trade in the wider sense, a married woman must either have the capacities of a feme sole or be expressly authorized to enter into business.

Although the difference between earnings and increase of property is clear, and for this reason married women's separate property acts do not destroy a husband's rights to his wife's personal services, it is very hard to draw any line between earnings and the profits of trade. The terms used in the books dealing with the subject of married women traders are not sharply defined, but a few definitions may be given.

Earnings means what is earned, gained or merited by labor, services or performances; wages or reward; and the earnings secured to a married woman by a statute are not confined to the results of manual labor,—to wages for washing or sewing, but include the products of her trade also, if it is carried on with her separate property as capital; and the stock in trade of a married woman owned at the time of her marriage, or afterwards bought with her earnings, is included in the term "earnings."

Trade or business means an employment to the carrying on of which the party devotes a consider-

able portion of her time, skill and means, a business that is continuing in its nature and embraces many transactions; engaging in trade and business means not only trading in a commercial sense, but also being engaged in other employments which require time, labor and skill. Trading means engaging in a business pursuit, mechanical, manufacturing or commercial. Thus, though a single transaction may be a business one, it does not make the party a trader; horse dealing may be a business, but a woman who buys or sells a single horse is not necessarily in that business; so farming may be a business, but employing a man to work on one's farm does not make one a farmer by trade; renting a house may be a business transaction and for the purpose of a business, but a lease of rooms is not necessarily a contract by a trader; so a married woman's receipt and disbursement of her rents and profits, though done in a business way does not constitute her a trader; nor is she a trader when she is not acting generally with the public, but is simply taking care of her own property, or collecting or investing her income. When she may trade she is not confined to any particular trade; she may not only engage in washing, sewing, dressmaking, millinery, in keeping a dairy, a boarding house, a grocery or provision store and in other pursuits specially adapted to her sex, but she may be a farmer, a miller, an army sutler, a saloon keeper or tavern keeper, a clothier, an iron-monger, she may work a mine or quarry, or may go into the lumber business; though if her trade is unsuited to her, this is a fact to be considered, if her husband's creditors are trying to show that the business is really his. So she may engage in the professions—may devote her talents to literature, acting, singing and in fact,

under a general power to trade, may follow any legitimate calling.

The trade of a married woman is usually spoken of as her separate trade; the word "separate" refers rather to her status than to the mode in which she shall trade, and it does not mean that she shall trade alone, or prevent her living with her husband while trading, or allowing him to join in the business. In Massachusetts and Indiana it has, however, been held that she must keep her business separate from her husband, and that their joint earnings are his property. The effect of the mingling of the wife's with the husband's property has already been discussed.

When a married woman's husband is civilly dead, or has finally abandoned her, she has by the common law the capacities of a feme sole, and may trade as such. In some states there are statutes to the same effect. How far her husband's absence enables her to trade in his place has already been discussed.

By the custom of London a married woman who carried on a trade separate and apart from her husband had, to the extent of such trade, all the capacities of a feme sole. Such custom has never existed in the United States, except to some extent in South Carolina. The law recognized this custom not for the sake of wives, but to encourage trade and commerce, and therefore the custom did not apply, for example, to farming. When trading under such a custom the wife could be a bankrupt; but her suits were generally conducted jointly with her husband for conformity.

In those States where a married woman is a feme sole as to her equitable separate estate, she may use the same in trade, and the profits of such trade are equitable separate property likewise; but

in such trade she has no personal capacities; equity recognizes her separate existence only with respect to her property, and her contracts made in the course of her trade can be collected only if they have been properly charged on said property.

A husband cannot, by his consent, change the personal status of his wife, or enable her to trade with the capacities, rights and liabilities of a feme sole; but he may allow her to engage as his agent in business and give her the profits, or he may agree before or after marriage that she shall keep her earnings or carry on business for her own use, and give her, if he choose, the necessary capital to start with. Any such gift of earnings, profits or property to her is good against himself, and his heirs, and voluntary assigns, but not as against his creditors, unless for valuable consideration. When a wife thus trades under a settlement from her husband, she trades in equity as with equitable separate property; the business, profits, etc., are her husband's absolutely at law. But if the business is really hers and not carried on by her as his agent, he is not bound for the debts. If his consent to her carrying on business is by mere oral assent and without consideration, though he cannot ask back profits already made and collected by her, he can revoke his consent, and claim the business as his own. In all cases where she carries on business by his mere consent, the business is his, and he is liable for its debts, and may claim its profits. Whether the business is his or hers is a question of fact. Her agency for him may be proved directly or indirectly. But if a wife has engaged in business without authority of law, and without her husband's consent, he cannot be held liable for its debts, nor can she on her mere personal contracts; so if all the credit is given to her, her husband is not liable, whether she or her property is

liable or not. Under the statutes usually, the husband's consent is not necessary to enable a wife to trade; nor does his mere consent involve him in the liabilities of the business.

Married women's separate property acts do not, by implication, destroy the husband's common law right to his wife's earnings, but they do usually, expressly or by implication, secure to the wife the natural increase of her property, and since such increase belongs to her, even when largely due to her husband's efforts, there seems to be no reason why her own services to it, though these belonged to her husband, should injuriously affect her rights. When a married woman has no powers by statute independent of her property, her dealings with her statutory separate property in the way of trade must be subject to limitations of the same character as those which control her trading with her equitable separate estate. She cannot, for example, under such a statute, carry on a business on her personal credit. Her right to manage her separate estate and her right to trade are quite distinct. A contract for furniture to be used in a boarding house which is her separate property, or for horses for her livery stable, may not be valid as the contracts of a trader, but valid as contracts with relation to her separate property.

A statute securing to a married woman her earnings, or the products of her skill and industry, by implication enables her to earn money and to trade, just as statutes securing to married women property acquired by purchase enable them to purchase on credit; thus alone are such statutes given a reasonable meaning. A statute enabling married women to trade, unless it contains restricting provisions, enables them to trade just as if they were sole, to use any of the usual means of trade, and to

engage in any legitimate calling. A married woman may also trade under statutes giving her the capacities of a feme sole as to contracts.

Under a statute enabling married women to trade with a capital of one thousand dollars or less, and creating a special remedy against her property for her trade debts, it was held that she had no powers not expressly given; that the naming of one mode of trade was a negation of all other modes; and that she could not trade as a partner because not expressly authorized. In many states the statutes require a wife who wishes to engage in trade to comply with certain prerequisites, such as making a declaration of record, obtaining a license, or decree of court; and such requirements must, it seems, be complied with to give her any new capacity. But a statute providing that her husband shall not manage her business has for its sole object the protection of the husband's creditors, and when no question in which they are concerned is involved she has the same capacities to trade with as without her husband; and the same would seem to apply to a statute requiring her to trade in her own name. When she can be declared a trader only when her husband cannot or refuses to support her, his mere temporary sickness will not suffice. Nor will a court of equity with a discretion decree her a trader when she would thus be enabled to commit a fraud. When a statute requires "a married woman doing business on her separate account" to file a certificate, this does not apply to married women making investments of their separate property. A married woman need file no inventory of her business unless this is required by statute; nor need she have separate property to start with.

The status, rights and liabilities of a married woman trader depend very largely on the source of

her capacity to trade. Generally speaking, when she can trade only by virtue of her ownership of equitable or statutory separate estate, she cannot trade on her personal credit or act as a feme sole, but can only deal with the property so that the profits will enure to her own benefit, and can only render it liable for her debts by charging it, contracting with reference to it, etc., her contracts being valid not on account of her being a trader, but because made in such a way or for such a purpose as the law allows. So when she trades simply as her husband's agent, though she binds him she does not bind herself personally—she may have the profits if he chooses to let her keep them, but he and the business are liable for the debt contracted by her on its behalf. When, however, she may trade personally, by virtue of her husband's abandonment, by custom, or by statute, she can trade just as if she were unmarried, unless, of course, the statute limits her capacity. In such case she, for the purposes connected with her business, has the status of a feme sole, the fullest rights to the enjoyment of the profits of the business, and the fullest liabilities for its debts.

Most of the statutes as to married women traders expressly provide that they shall trade as if sole, and under such statutes no special questions seem to have arisen; the main questions are as to the implied powers of married women traders. In one case it was held that the naming of certain powers of trade was a negation of all other powers; but the weight of authority seems to be to the contrary.

Under statutes enabling a married woman to trade and not limiting her capacities, she may trade precisely as if unmarried; she is as to her business, a feme sole, and may do all things incidental to trad-

ing in general, and all things usual and proper in the particular trade in which she is engaged. The object of these statutes is not only to do justice to wives, but also to encourage trade. Thus she may engage in any legitimate calling. She may conduct the business personally or by agent; she may have her salesmen and clerks; she may be a partner, silent or active; and she may, unless this is prohibited by statute, have her husband as her agent, or be a partner with him; though this is in some states denied. She need not, unless the statute so provides, have separate property to begin with; she may start out on credit, or use property given her by her husband, though in the latter case his creditors may have rights. The capital and stock in trade of her business, as well as the profits, are entirely hers; for instance, the bills due her as a boarding house keeper; and such property, though in the possession of her and her husband, is in her possession, the possession relating to the title. She may on credit purchase goods for her trade; or buy land or seed for farming purposes; or rent a store; or contract for her services; or contract for working a quarry—for the labor and mules; she may transfer a note received in the course of trade; she may even sell out her business; and agree not to use the same name again. She is personally liable on all contracts which she executes in the conduct of her business, even as endorser of a note; she is liable for the frauds of her employes, and is estopped as if sole from denying their right to represent her; she is liable for goods consigned to her. She may sue and be sued alone and at law, except, perhaps, as to suits with her husband; and a general judgment may be obtained against her. The question whether a particular transaction of hers was in the course of her business is one of fact. In suing, she must

allege and prove this; and when she is sued, the plaintiff must allege the grounds of the liability, must allege and prove affirmatively that she was engaged in business, and that the particular transaction was connected with such business. She may make a deed for the benefit of creditors, and take the benefit of the insolvent laws.

The business creditors of a married woman trader have, under the statutes generally, the same rights as if she were sole; they may sue her alone, and obtain a general judgment against her. If she is a partner, all the partners must be joined. The husband cannot set up against them any rights that he might have against her in property he has suffered her to use in the business. If she is not trading with a personal capacity, but simply by virtue of her ownership of separate property, such creditors have generally no rights in personam against her. In some states her creditors are given special remedies. When she acts simply as her husband's agent, her creditors are really his creditors, and the business is really his business. Her creditors other than those of her business can proceed against her business only as they could against her other separate property.

If the wife labors in her husband's business, or allows her property to be used therein, the profits are nevertheless subject to the rights of his creditors; but she is not personally liable to the creditors of the business if she has acted only as his agent, and has no capacity to contract. His creditors have the right to go against her separate business for any sums put into it by her husband in fraud of their rights; but it is doubtful whether this applies to a bona fide gift by him to her of his services; in some cases an apportionment has been made, and this would of course be done if he and she were partners.

His creditors have no rights in the profits of her separate business, in cases where he has provided neither property nor services. Still, they have the right to treat the business as his when she has not complied with the requirements as to filing a declaration of record, etc. When she cannot be his partner she incurs no liability by holding herself out as such.

When a man married a woman engaged in trade, he at common law took the business with its assets and liabilities; now he is liable only where he is still liable for her ante-nuptial debts, and has the right to the business only when such property is secured to her neither by settlement nor by statute. So at common law, all the profits of her business during coverture vested with her other earnings and the other increase of her property in him; but this, too, is generally changed. It is his business and he is fully liable, and need not give her any part of the profits if she is trading simply by his consent and has no other authority; she may even be a partner in his place. When all the credit is given to her he is not liable. Nor is he liable when she is trading independently of him under the statutes, unless he is a partner, or actually joins in the transaction.

It has been held that a married woman trading in equity with her equitable separate property may enter into partnership; but this statement must be taken with limitations. For the normal contract of partnership is a personal contract, involving a personal capacity, which a married woman does not have either in equity or under mere separate property acts. And therefore it is settled that statutes securing to married women their property with rents, profits, increase, etc., thereof, although they enable her to trade in a limited way, do not enable her to enter into partnership. At common law,

when a female partner married, the partnership was dissolved, and now she cannot be a partner if she has no capacity to trade personally, or if she is expressly prohibited by the statute enabling her to trade, or so far as she is partially prohibited, as she is in some states. But as she has, under the statutes giving her the capacity to trade generally, the personal capacity to trade as if sole, and the power to pursue all the usual methods of trade, she may, under such acts, trade in partnership; she may even be held responsible as a secret partner. Still in a few cases, and on different grounds, this has been denied. So, as she is a feme sole in her trade, and may employ an agent, general or special, and may employ her husband as such, there seems to be no reason why she should not be able to form a partnership with her husband; and many cases hold, while others assume, that she may. But this is also strenuously denied, on the ground that even where a married woman may contract, she cannot, without express authority, contract with her husband, and that the particular statute enables her to trade on her separate account. To this it is replied, that if she may employ her husband as her agent, as all admit she can, it is not consistent to say that she cannot contract with him; and that the word "separate" in the statute does not refer to the mode in which a married woman shall trade, but to her status as independent of her husband's marital control and marriage rights. In such cases, as she cannot be a partner or be liable on a partnership note signed by one of the other partners, she can, nevertheless, be liable for her individual acts; nor does she, in such cases, lose her property put into a firm business. Though she may not join a firm of which her husband is a member, she may, after his retirement, go in, and on a new consideration become liable for

the pre-existing partnership debts. So, although she cannot be a partner, she may jointly lease and share the profits of joint property, and be bound by her husband's acts as her agent with respect thereto. If the husband has furnished part of her capital, her business may pro tanto be liable for his debts, and the courts have sometimes, without speaking of husband and wife as partners, ordered an apportionment of the profits of a business jointly carried on by them.

Very nearly the same questions arise in considering a married woman's capacity to be an incorporator as those which are involved in her right to be a partner. Incorporators enter into a mutual and personal contract, which is concluded by the act of incorporation; and therefore, without personal capacity to contract, a married woman could not be an incorporator. But as business is very commonly carried on by corporations, a married woman with capacity to trade would, it seems, have capacity to be an incorporator. The fact that the corporation laws provide that "any person" may be an incorporator would not affect a married woman under incapacity, by virtue of a rule already discussed. But a married woman may be a stockholder, holding her stock as any other chose in action; and it has been held that when she can hold stock as if sole, she is liable, as any other stockholder, for example, for assessments.

A married woman's subscription to stock is an executory agreement, and, as such, void at common law; but a note given for stock has been held beneficial to her separate estate, and therefore a charge thereupon, and by statute, in some states, she may be a subscriber.

Whether married women may act in represen-

tative capacities, whether they may be agents, trustees, administrators, executors, guardians, etc., and how far their acts in such capacities have the same effect as the acts of persons sui juris in similar capacities, are questions which are nowhere fully discussed; and much confusion is likely to result in such a discussion, unless the different points of view from which the subject may be approached be borne in mind. For example, a married woman may be an agent, in the sense that she may, as if she were sole, bind a party who has authorized her to act for him, but not necessarily at the same time, in the sense that she may recover compensation for her services, or be liable for money received to her principal's use, or be personally liable to third parties with whom she has dealt in her own name. So she may be a trustee, in the sense that her husband cannot claim substantial rights in property of which she holds only the bare legal title, and she may dispose of such property in accordance with the powers vested in her by the trust; and yet she would not be liable personally for work done at her request, as a person sui juris would be, or be able to bind herself personally to execute the power of her trust. And so she may be an administratrix, in the sense that once appointed she may act as such, and yet her appointment may depend on the consent of her husband. So as to guardianships. It thus plainly appears that a married woman who may act in a representative capacity does not, while so acting, have the same rights and liabilities as a feme sole and that the following questions may arise, namely: (1) How far do her conjugal obligations conflict with her right to act in a representative capacity—how far has her husband the right to control her in this respect, (2) How far do her personal disabilities—her coverture, affect her

capacity to so act, (3) How far do her acts in a representative capacity affect her personally, (4) Or her husband, (5) Or her principal or estate, (6) Or the third parties with whom she deals.

With regard to the questions already stated, certain general rules may be formulated, to wit.

(1) As to Husband's Consent.—At common law, a husband not only took his wife with all her accrued obligations, but he was also jointly liable with her for her torts, whether committed with his consent or not, and was therefore liable for all her breaches of trust, devastavits, etc.; so that for his own protection he had the right to say whether she should act in a representative capacity, and subject him to such additional risks. But his consent was necessary only so far as his liabilities were concerned,—he could not, for example, object to her executing a power to convey property, and for this reason, it would seem that his right to object at all is removed by statutes destroying his marital liability for the acts of his wife.

(2) As to Wife's Coverture.—The fact that a wife has no personal capacities, but is under the disabilities of coverture, does not prevent her acting in a representative capacity; she may be an agent, administratrix or executrix, trustee, or guardian; it only affects her personal rights and obligations while acting in such capacities. A married woman is not in this respect like an idiot; she has as much discretion after as before marriage.

(3) As to Personal Rights and Obligations of Wife.—The fact that a married woman may act in a representative capacity, and is so acting, does not enlarge her personal capacities, or remove, as far as she is herself concerned, her marriage disabilities, or affect her personal status. Her contracts, though made in her own name, do not bind her per-

sonally, unless she has the capacity to contract personally; so she may be unable to stipulate for any compensation. For her torts she is, of course, personally liable, for a married woman is not, even at common law, under disability to commit wrongs.

(4) As to Her Husband's Rights and Obligations.—A husband has no property or estate in funds held by a married woman in a representative capacity. He generally sues and is sued with her for conformity, and on contracts on which if sole she could have declared in her own name, he could at common law sue alone. For all his devastavits and acts in the nature of tort he is jointly liable with her, in accordance with the rules already discussed relating to a husband's liability for his wife's torts. He is liable for her contracts only if she acted as his agent. He must account for any money which passes into his possession.

(5) As to the Estate or Principal.—The estate or person whom the wife represents is bound, and receives the benefit of her acts just as if she were sole; her conveyance in accordance with her powers, or her receipt for funds, is binding as if by him.

(6) As to Third Parties.—The rights and obligations of the persons with whom she deals as representative are the same, as far as the person or estate which she represents is concerned, as if she were sole; but as far as she herself is concerned, they are simply such as may exist against any married woman.

CHAPTER VII.

SEPARATE PROPERTY OF MARRIED WOMEN

The separate property of a married woman is that of which she has the exclusive control, independent of her husband, and of which she may dispose as she pleases.

The separate property of married women may be classified into the equitable and the statutory; the former being that recognized by the courts of equity irrespective of statutes; the latter that recognized and created by those statutes which limit the common law rights of the husband in his wife's property, and which enlarge the rights of the wife. The two classes of property may exist together.

The Alabama Code establishes an entirely new system of laws relating to the property of married women, and abrogates the distinction between the equitable and statutory separate estates, except in cases where the property is conveyed to an active trustee, and, therefore, with that exception, equitable separate estates are now statutory in Alabama.

The whole doctrine of the separate estate of a married woman is a creature of equity, and sets at naught all or most of the principles of the common law touching the marital relation, and also touching property generally.

Thus, a wife may be enabled to dispose of her separate estate as freely, and with less solemnity than a feme sole, to charge it merely by implication, as a feme sole cannot do, and may also be restrained from conveying or charging it at all, a restraint ad-

verse to one of the most settled doctrines of the general law of property. In respect to the power of alienation of a wife's separate estate, a distinction is made between real and personal property. As to personal property, the wife may dispose of it absolutely at her pleasure, by deed or will, as if she were a feme sole; unless the instrument which creates the estate and vests it in her shall impose restrictions, and then these restrictions will constitute the law of the case. In respect to real property her power of disposition is more circumscribed. If she is not in terms allowed, by the instrument which clothes her with the separate estate, to alien it in some designated way, she can do so only by will duly executed, or by deed executed with the formalities prescribed for married women. And it seems that, though permitted to alien otherwise than in pursuance of the statute, she is not thereby precluded from adopting the statutory mode. The rents and profits of her separate real estate constitute personalty, and may be disposed of accordingly, unless invested in lands. Where the wife has the power of disposition, she may bestow her separate property as well on her husband as on a stranger, and not by giving it to a third person to give to him, but by conveyance directly to himself (unless where she conveys under the statute). But a court of equity will not give sanction or effect to a conveyance to the husband without first subjecting the wife to a privy examination, and adopting such other precaution as shall seem needful to ascertain her freedom of action.

Although the subject of "Pin Money" has been briefly commented upon in the chapter on Husband and Wife, it may be said by way of amplification, that "Pin Money" is a provision made by the husband, either in pursuance of a marriage contract

or by a gift, for the purpose of supplying the wife with articles of dress, and with pocket money, in order to prevent the annoyance of a constant recourse to him with petty demands for personal expenditures. It may consist of gifts of money made from time to time, or of a specific periodical allowance, or of the savings and profits accruing from her efficient domestic management. It must not be to the prejudice of the husband's creditors; and the wife acquires an unimpeachable right of property therein subject to two qualifications. First, it is bestowed for the specific purpose of decking her person for the credit of the common household, and a husband has a certain interest in it as well as the wife, and may demand, or constrain, the expenditure to be made accordingly; second, even though stipulated for by a marriage settlement, she cannot call upon her husband to pay any arrears if he has meanwhile provided for her current wants; nor in any event beyond the arrears of a single year. Nor, it seems, can her personal representative demand any arrears at all, for the money is designed to dress and adorn the wife during the year and not for the accumulation of the fund.

An equitable separate estate may be created in a married woman by a written instrument, or even orally in the case of personalty; it may be by deed or by will, in trust or direct, ante-nuptial or post-nuptial. No trustee is necessary; equity never suffers a trust to fail for want of a trustee. It has even been held unnecessary to make the settlement in the form of a trust. The husband will be deemed to hold as trustee for his wife and to be accountable to her for the rents and profits as any other trustee would be.

Technical words are not required to create an equitable separate estate. It is necessary only that

the terms of the settlement show that the settlor intended the husband should have no marital rights in the property in question. If no such intent appears, there is created but an ordinary trust for a married woman. The release of her dower is a good consideration for a conveyance to her separate use.

The following phrases by themselves have been held to have the effect, in a settlement on a married woman, of excluding the husband's rights: "For her sole and separate use." "For her own sole use and benefit." "For her use and benefit." "For her sole use." "As her separate estate." "For her full and sole use and benefit." "Only as and for her own separate estate, free from the control of her husband." "For her sole use and benefit." "To her exclusive use, benefit and behoof." "To her sole use, benefit and behoof." "For her exclusively." "For her exclusive use and benefit." "For her own use and at her own disposal." "For her sole and absolute use." "To be hers and hers only." "For her own use and benefit independent of any other person." "For her without any hindrance or molestation whatever." "For her use independent of any husband." "Not subject to the control of her husband." "Not to be sold, bartered or traded by the husband." "For her livelihood." "For her sole and exclusive use."

The following phrases by themselves have been held not to have the effect in a settlement on a married woman, of excluding the husband's rights: "To A's wife." "In trust for her." "For her proper use." "To her and her children." "For her own use." "And enjoy as she sees fit." "For her use and benefit." "For the joint use of herself and husband." "For her own use, benefit and behoof," and "In her own right."

Where the settlement proceeds from the husband it is generally to be construed as operating to her separate use, though no such words are used as would be necessary to create a separate estate in a conveyance by a stranger; otherwise the conveyance will be without effect. The doctrine that a gift to the wife is a gift to the husband cannot apply where the husband himself makes a gift or grant to the wife, which surely cannot be taken as a gift or grant to himself. And where the husband himself makes a gift or grant to the wife, the intention to relinquish his own rights in favor of the wife, and thus to give her a separate property or interest, is necessarily and most clearly and unequivocally manifested and declared. A promissory note of a third person, given by the husband to the wife during coverture, becomes a part of her equitable, and not her statutory estate, and any conveyance of property by him to her directly by coverture except by compensation or substitution for other property which belongs to her statutory estate, creates in her an equitable estate. Where a married woman claims her earnings as her equitable separate estate, by way of gift from her husband, it will not be sustained, unless it is made clear that the husband intended to divest himself of all interest in such earnings, and to set them apart to the wife.

The intention is to be gathered from the whole instrument, and in ascertaining it, a liberal construction is to be adopted; and the court is not confined to the deed itself, but may resort to the marriage contract, if there is one. For instance, in a settlement of property by a husband on his wife, free from all his liabilities, an exception of such incumbrance as the two together shall request the trustee to make is not repugnant to the grant, but is merely a qualification thereof.

A recital in a deed that it is the separate property of the wife, removes any presumption that it is community property, and vests the title according to the terms of the deed.

A verbal ante-nuptial contract by a woman that she shall own and control as separate estate, the property she then has, will be valid, and though her husband contributes his services as carpenter and builder in erecting a house upon land purchased by her, it cannot be subjected to his debts.

If, in a sealed instrument, the husband acknowledges the receipt of money as his wife's share of her parent's estate and binds himself to return it to her when she so desires, it shows a sufficient intent to create a separate estate in the wife, and the marital rights of the husband do not attach. Where she is dissatisfied with his investment of her money in land, and he promises to pay her the value of the property, her executors may claim the value of the same against his estate on his failure to do so.

Where a married woman mingles with the profits of a boarding house run by her, a monthly allowance from her husband, and it is not apparent whether the furniture of the house is purchased with her money or that furnished by the husband, it will be deemed to be her separate property. A court of equity can settle on her her share in the personalty of her father's estate, in the hands of an administrator, and the creditors of her insolvent husband cannot have the same applied to the payment of their claims.

Where the plaintiff's husband drove a number of cows at night from her premises and the next day they were found in defendant's possession, he claiming to have purchased them from her husband and refusing to return them, and the evidence showed

that the plaintiff had purchased the cows with her own funds, that feed bought for them on credit was charged to her, that she had supported the family, and that the owner of the premises she occupied had given her permission to live there, it was sufficient to sustain the finding of a referee, in an action of trover for the cows, that they were hers.

If a husband allows his wife, during his lifetime, to hold a note and use the proceeds as her own property, it must be considered to have been her separate estate. And if he recognizes a trust, made for her benefit by an investment of her share in an estate during his absence, it will be considered her separate estate.

But where, by an ante-nuptial parol contract, he agrees, in consideration of the marriage, that she shall hold all her property then owned or thereafter acquired, as her separate estate, but vesting in her no power of disposition, she takes from him the use and control thereof during life, but at her death bank stock owned by her goes to him.

A wife cannot claim as her separate estate property of her husband on which she has erected a dwelling, under an agreement with him for its conveyance to her, so as to exclude the claims of her husband's creditors; nor is alimony awarded to a wife by the decree of divorce her separate estate. Nor lands, in the absence of recitals in the deed sufficient to create a separate estate, conveyed to the wife by the husband with the intent to shield it from his creditors.

An ante-nuptial contract entered into in France, excluding property there owned by the wife from the community property, does not, in the absence of an agreement that the real estate of the wife shall be her sole estate free from the control of

the husband, secure to the wife as separate estate, real estate owned by her at that time in Missouri.

It has been held in Pennsylvania that where a woman, at the date of a will devising property to her, is neither married nor contemplating marriage, she will not take a separate estate therein, although she was married at the death of the testator, and the devise vests in her absolutely.

And also that a wife cannot recover against the execution creditors of her husband, where the property seized was in possession of the husband, unless she shows that the property was paid for out of her separate estate.

The presumption that property bought by a wife with the money of her husband was intended as a settlement for her, may be rebutted by proof that it was understood between them that the property should be his, or that she took the title thereof without his knowledge or consent.

Where a wife owned lands lying in another state, never during her lifetime reduced into possession by the husband, the court of Vermont treated moneys received for rent of the lands as assets of her estate, without requiring proof that she might have held the income thereof as her own, by the laws of the State wherein the land lay.

In a few states it is held that a married woman has no power over her separate estate but such as is given by the instrument creating it; it was held in Rhode Island that a married woman had no power to charge her separate estate unless it was given her in the instrument creating the trust. But in a later case the court said that without words in the instrument restraining her it is not to be doubted that the equitable estate of a married woman, in real property settled to her sole and separate use, is as alienable by her—she and her husband joining in a deed,

executed in solemn form under the statute—as her legal estate in real property; but the English rule and the one adopted in the majority of the states is, that, (a) as to personal property or the produce of lands, she may dispose of it freely, by will or otherwise, precisely as if she were feme sole, save only when it is otherwise provided by the instrument whence she derives the estate; but, (b) as to real property, a more rigorous doctrine prevails. If not expressly allowed to dispose of it in some designated way, she can do so only by will, executed as wills of land are required to be executed, or by deed of conveyance, executed with the formalities prescribed by law for married women.

The Kentucky statute, allowing a woman to dispose by will of any estate secured to her separate use by deed or device, or in the exercise of a written power, does not allow her to dispose of land, unless the deed itself creates in her a separate estate. And where the husband, after her death, executes a writing relinquishing all his interests, the same as though it had been deeded to her separate use, and the will had been made in pursuance of a written power, and files it at the probate, it does not validate the will where the rights of heirs are already vested under the statutes of descent. Nor does a power to use, sell, exchange, reinvest or otherwise dispose of, as she may think proper. Under this statute her separate property may be conveyed by order of court. Her signature to the application for the sale, and to the deed, is sufficient evidence of her assent. Or her separate property may be conveyed under a power of attorney to her husband; and she may dispose of it to secure the payment of his debts. She will be bound by covenants contained in her deeds; but a lease by the husband, without her consent, is void, and in an action by her to recover possession no notice to quit is necessary.

When the instrument creating the trust provides that it may be disposed of by one mode, other modes are generally excluded. A number of cases support the opposite doctrine, that a power of disposition specifically pointed out does not preclude the adoption of any other mode of disposition unless there are negative words restraining the exercise of the power to the very mode pointed. On an examination of these cases it will be found that an absolute estate was granted the wife, the instrument specifying that it should be conveyed by deed, in which the husband or trustee joins, or by will, and the question arose on her power to charge it with her debts.

As a corollary to the above proposition, it is the settled doctrine in England that a married woman may charge her separate estate in equity even by implication, with her debts, contracts and engagements. By entering into such engagement she must have meant to effect something and as she cannot have expected to have charged her person she could have had no other design than to subject to the fulfillment of her engagements so much of her separate estate as is subject to her absolute disposal as if she were a feme sole. And this is the general rule in the United States, though in some states the contract must be for the benefit of the wife or her separate estate. Following is the doctrine as to a married woman's charging her equitable separate estate as it exists in each of the states in the Union:

ALABAMA.—There is, in this State, an essential difference in the manner of charging the statutory separate estate of a married woman and her equitable separate estate, or separate estate by contract. The former is charged by the statute with the price of certain articles, the character of which

is specified, and her agency in purchasing them is immaterial; while the latter can only be charged by the act and agreement of the wife, and, in the absence of restraining words in the instrument creating the estate, it may be charged to the same extent as if she were a feme sole.

By giving a promissory note for the purchase price of land conveyed as statutory estate, and a mortgage to secure the same, a married woman thereby charged her equitable separate estate.

She may become a member of a partnership and her interest will be subject to a judgment against it in a common name. Where a conveyance was to her use, with power to sell, or mortgage the same, provided she join with the trustee in any sale or conveyance of the property, and by such joint action manifest her consent in writing to the disposal of the same, she was allowed to mortgage it to secure her husband's debts without the trustee joining. A charge against the equitable separate estate can only be enforced in equity; and the creditors have priority in the order in which their bills are filed.

ARKANSAS.—In order that her separate property may be bound, it is not necessary that she should execute an instrument expressly referring to it or purporting to exercise a power over it. It is sufficient that she professes to act as a feme sole; for the court of chancery in giving her the capacity to hold separate property gives also the capacity, incident to property in general, of incurring debts to be paid out of it, and enforces payment of such debts when contracted, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied.

But the contract must be for the benefit of herself, or her separate estate, or it cannot be enforced against it.

A married woman may charge her separate estate by the employment of counsel to prosecute a suit for divorce, and if she die before the termination of the suit, the counsel will be entitled to be paid out of her estate for the service rendered during her life. A judgment against a married woman upon a claim for which she is not legally liable—for instance, as maker of a note for the accomodation of her husband—is not void, but may be enforced against her separate property.

CALIFORNIA.—A married woman may contract for services to be rendered for the protection and preservation of her separate estate, which is personal property, and for services thus rendered on the faith of her separate estate, a court of equity will enforce a lien; but she cannot create a lien on her separate estate except by contract in writing signed and acknowledged by her.

But courts of equity are careful in guarding against imposition, and in seeing that dealings with her affecting her separate estate are free from fraud and reasonable in their terms, and that no unfair advantage has been taken of her.

COLORADO.—There must be an express promise binding the separate estate, unless the contract is for her benefit, or for the benefit of her separate estate. Her contracts were formerly valid only against her separate property in equity.

CONNECTICUT.—The presumption is that a contract entered into by a married woman having a separate estate, for its benefit or for its exclusive benefit, was contracted upon the credit of her estate. A husband cannot rebut the presumption of law that a building erected by him, on her separate property, is intended for her benefit, and cannot recover the value of such building either from her or from her estate.

'RICT OF COLUMBIA.—A purchase of
›y a married woman, for a house forming
ıte estate, is a contract relating to her
ıtate and will be enforced. But otherwise
ıe was not her separate estate. Nor is the
›f a horse and carriage to be used in riding
orth from her home in the country to look
ıerty in the city, for the benefit of her
state or a contract relating to it. If she
husband to buy supplies for the family
credit of her separate estate, she will be
:for.

RIDA.—Unless the indebtedness is in-
account of the beneficial nature of the
ion, as inuring to the benefit of her prop-
ate, the only manner in which a married
ing with her husband, can create a charge
ıeparate property, is by some deed, mort-
:her instrument of writing, duly executed
›wledged according to the statute. But
of the wife will be charged in equity with
of improvements which she causes to be
on.

RGIA.—While the wife may contract,
: bind her separate estate by any contract
hip, nor by any assumption of the debts
band; and any sale of her separate estate
:reditor of her husband in extinguishment
shall be absolutely void; and this applies
› the separate estate of the wife created by
to any property held by her as separate
ıis does not affect the power of a widow
t with reference to such debts after her
death. In other respects the rule is the
England.

NOIS.—The debt must be contracted for
:nefit, on the credit of her separate prop-

erty, or in reference to it, or there must be some appropriate instrument executed by her with a view to make the debt a specific charge. A contract by a married woman compromising a bona fide claim against an estate in which she has a right to a distributive share, is one in respect to her separate estate, and binding on her, notwithstanding her coverture.

INDIANA.—In this state the rule is the same as in Illinois. The intent to charge must be clear and is not to be presumed, and the contract must be one from which benefit results to the property.

IOWA.—Iowa adopts the same rule as Indiana and Illinois.

KANSAS.—Kansas follows the English rule, and a married woman may bind herself by her contract, to the extent of her separate property. A personal judgment may be rendered against her which will reach any or all of her separate property not exempt from execution under the exemption laws. When a married woman executes a promissory note, she, of course, means something. She either means to charge her separate estate, or else she means to cheat and defraud the person to whom she gives the note. Is it not more charitable to suppose she means the former? But suppose she means the latter, will courts of equity hear her plead her own guilt and fraud? If the contract of a married woman does not bind her separate estate, then, of course, it is a nullity; for it is well settled that it cannot bind her personally. But to give her contract such a construction violates at least two well settled principles of law: First, it presumes her guilty of fraud before the fraud is shown. Second, it adopts a construction which will defeat the contract, instead of adopting the construction which will prevent its

violation and give effect to the obligation of each and all parties.

KENTUCKY. — A married woman may charge her separate estate whenever she thinks proper to do so, but her intention must be manifest or otherwise it will not be held liable. The execution of a note or endorsement of a bill of exchange has been regarded as manifesting an intention by a feme covert to charge her separate estate. It must be the debt of the wife and the credit must be given to her, or she must receive the benefit of it. A married woman, with power to sue and be sued, to contract and manage, sell, convey, and devise her property cannot make herself liable upon a contract of suretyship for the husband or for others; but where a device in trust, to pay her the income, contained a provision that it was not to be liable for her debts, it was held that it might be subjected nevertheless. Her separate property is not liable, after marriage, for necessaries, unless the contract be in writing and signed by herself and husband; but a joint note by herself and husband given in payment for necessaries, is sufficient evidence in writing.

MARYLAND.—In Maryland it must be affirmatively shown that the contract was made by the married woman with direct reference to her separate estate, and that it was her intention to charge the same. But where a husband and wife bound themselves to execute a mortgage of the separate estate of the wife, by a contract founded upon a proper consideration, it was enforced by a court of equity and the estate held liable for the debt intended to be secured. Where a husband and wife own adjoining tracts of land, and the husband, intending to build a house for himself, selected a site on the tract belonging to the wife because it was a more commanding and in every way a more desir-

able location, and made a contract for the erection of a house, and, when it was finished, paid in full the contract price, notice to the husband by a furnisher of materials that he intended to claim a mechanic's lien was held insufficient, as the notice should have been given to the wife, the husband not being her agent in contracting for the erection of the house.

MASSACHUSETTS.—The contract must be made with reference to the separate estate. A married woman cannot bind her separate estate by a contract of suretyship, unless in consideration of the benefit to herself or to the estate. And the fact that a note given for the indebtedness of her husband, and signed by both, is secured by a mortgage on her real estate, does not render her liable on the note. Her husband may act as her agent, and evidence that he has the general management of her premises, and employed a man to perform labor upon a house upon the land with the wife's knowledge, and that she gave directions as to parts of the work, will justify a finding that he was her authorized agent. While evidence that work done on the separate property of a married woman was done with her knowledge, may warrant a jury in finding that she agreed to pay for it, it raises no such presumption of law, and the judge has no right to direct a verdict for the plaintiff in an action against her.

MICHIGAN.—To sustain a contract made by a married woman it must appear to have been made with the intent to bind her separate property, as well as upon a consideration that would sustain it for that purpose. She may be held personally liable on her endorsement of paper due to herself upon an affirmative showing that it was directly for the advantage of her separate estate. Where a married woman living with an irresponsible husband prom-

ises that she will pay for goods and medical services to be furnished to her and her family, and they are charged directly to her upon the creditor's books, it appearing that he would not furnish them upon the husband's credit she is liable therefor. The holder of a bond, executed by a husband and wife for money borrowed for the wife's sole benefit and use in erecting a house upon land of which she was the owner in fee, is entitled to have the claim allowed out of her separate estate. But where the husband and wife gave a promissory note for money loaned for the sole benefit of the husband and there was no representation that it was for the benefit of the wife's separate estate, the payee cannot recover, as the fact that the note was signed by both was sufficient notice that it was not for the benefit of her separate estate. The fact that the husband acted as agent for the wife in procuring the loan makes no difference. A married woman is not liable upon her promissory note, given to secure the debt of her husband. It is void as soon as made, and will not be protected in the hands of a bona fide holder whether negotiable or not. But a mortgage given to secure credit for him will be enforced if no fraud is practised on the wife.

MINNESOTA.—A married woman cannot bind herself personally by any contract she may make. But her separate estate will, in equity, be held liable for all the debts, charges, incumbrances and other engagements which she does, expressly or by implication, charge thereon in any manner not inconsistent with the instrument by which she acquires title to the property. Where a building was erected upon land of which a married woman was part owner, under a contract entered into by her husband and others, and it did not appear that she was a party to the contract in any way, or that

her husband or any other person acted as her agent; that she had had any connection whatever with the erection of the building, or that it was erected for her on her account, or with her knowledge; or that she ever agreed to pay anything, for or towards the expense of its erection, she could not be held liable for the expense incurred thereon.

MISSISSIPPI. — In Mississippi a married woman may deal with her separate estate as if she were feme sole, unless her power is restrained by the instrument creating it. These estates have grown up with equity jurisprudence and are not recognized by courts of law. The married woman's law of 1857 does not apply to them, and the class of contracts which that statute enables her to make is not the criterion of her capacity to bind her equitable estate. She may render it liable for the payments of her debts by her separate acts. She may mortgage it to secure the payment of her husband's debts, but the incumbrance reaches only to the rents and profits of the realty and does not affect the fee. The plea of coverture is no bar to an action for the price of family supplies and necessaries sold to her, for the use and benefit of the separate estate. The plaintiff in order to charge the separate estate, must set out in its pleadings, under the Revised Code of Mississippi, the special circumstances which gave validity to the contract. A foreign judgment against a married woman cannot be enforced unless some fund consisting of her separate property is pointed out from which it may be satisfied. In only one instance can the husband impose a charge upon the wife's estate without her consent, and that is where her lands are devoted to agriculture. He may burden the estate in such case with a charge for such things as are necessary to the production of the crop, and for its management, without consulting

her, and nothing can exempt the estate from this liability except a waiver of it by the creditor. It is liable notwithstanding the husband misapplies the supplies and she receives no benefit therefrom; and such liability may be enforced in a court of chancery. But where the supplies were sold to the husband without knowing that the plantation was his wife's she was not estopped, after his death, from denying that she ever received them or that they were used for her benefit. The contract of a married woman to purchase land on a credit imposes no obligation on her personally or on her separate estate. Her separate property may be subjected to the payment of a judgment, even though acquired after its rendition. A judgment against husband and wife on a note for borrowed money is erroneous where the note is not shown to have been applied to her use or to her separate estate.

MISSOURI.—It is well settled in Missouri that a married woman is to be regarded as a feme sole as to her separate property, and competent to contract debts which will bind it, whether it be named or referred to, or not, and by giving a note or making a written contract she raises a presumption that she intends to bind such estate, and a contrary intention, to be shown, must appear from the instrument itself and cannot be shown by parol. The estate may be bound by a note executed in blank. She may subject her separate estate to a mechanics' lien. The fact that a husband, as trustee, contracted debts for the improvement of her property, does not of itself create a lien on the same, in the absence of a deed or other appropriate instrument of writing executed by him. Where her husband acts as her authorized agent, she will be bound, but not personally.

Where a married woman gives her notes for

the purchase money of real estate, and secures them by a mortgage upon the property purchased, no personal judgment can be given on the notes, but the lien created by the mortgage will be enforced by an action analogous to a proceeding in equity to subject the property to the debt. Her property cannot be attached. A proceeding in equity is the only method by which the separate estate of a married woman can be charged with the payment of her debts, and the jurisdiction of the court is in no way dependent upon antecedent legal proceedings of any kind. If she has but a life estate and only the usufruct of it inures to her benefit, she can create no equitable charge upon the property.

Demands against the separate estate stand upon the same footing at her death as other unpreferred demands, but the general creditors should resort to any other estate that she may have first. In order to bind the separate estate the contract need not be based upon a consideration moving directly to her; and though the contract may be made a charge upon the separate estate, it does not necessarily become a lien thereon. There is this difference between the written and parol promise of a married woman: where goods designed for family consumption are sold to a wife on her parol promise of payment, she will be presumed to purchase on the credit of her husband, while purchases made on her written agreement will be presumed to have been made on her separate credit. The endorsement of a promissory note has been held to be an appointment in writing; and though the terms of a deed of settlement only allow the wife to convey the separate estate by joining her husband, she may still subject it to the payment of her debts. Her separate estate will be charged in equity with damages for her breach of contract to purchase real estate.

NEW HAMPSHIRE.—This state adopts the English rule, and by statute the wife is made liable at law personally, as well as in respect of her estate, for debts contracted by her in respect to it. But she can make no contract for money or property in anticipation of the purchase of such separate estate.

NEW JERSEY.—The separate estate of a married woman will be held liable in equity for all debts which she, either expressly or by implication, charges thereon. But if she, during coverture, contracts debts generally without indicating any intention to charge her separate estate for the payment of them, it will not be liable. If she assigns a bond belonging to her separate estate, for a valuable consideration, and guarantees the payment, she will be held liable on the guaranty. She cannot bind herself personally, but the charge is one upon her separate estate. Such debts are not a lien upon the separate estate until made so by a decree of the court of equity. A married woman cannot charge her separate estate by a contract of suretyship, unless in consideration of a benefit to herself or to the estate. But the release of lands in which she has a dower right from an incumbrance is such a benefit. An obligation enforceable in equity will support an express promise to pay. Where a feme covert has no separate estate, her contract does not create an obligation which is enforceable in equity; and, therefore, is not such a consideration as will support an express promise to pay after the death of her husband. The jurisdiction in the court of equity over the separate estate of a married woman, rests not merely on the ground that it is an equitable estate, but on the ground that it is her separate estate, which is equitably subject to contracts and engagements entered into by her which are not legally

binding on her personally, and which cannot be enforced at law.

NEW YORK.—It must clearly appear from a written instrument that it was a married woman's intention to charge her separate estate, or the consideration of the contract must be for the direct benefit of the estate itself; and if charged by a written instrument, whatever separate estate she may possess at the time of the trial and judgment, even though acquired after the instrument was signed, will be bound. Where the wife knew that the plaintiff was at work on a house that she was building on her separate premises, and the kind of work that he was doing, the law will imply a promise on her part to pay for his services, although he was employed by the husband without any express agreement whether he should be paid by the husband or by the wife. And where a married woman informed the physician attending her that she owned a team of horses and carriages, and was worth enough to pay him her account, and it was on the strength of these representations that he attended her, it was held sufficient to show the existence of a separate estate, and to sustain a verdict for the plaintiff. Where a husband gave, in payment of an antecedent debt, his note, endorsed by his wife, to one who does not, on the faith thereof, release any security or legal rights, or extend the time of the payment of the debt, the wife cannot be held liable. And when a married woman sent an order to the payee of a note, signed by her as principal with her husband as surety, requesting that the money be sent by the holder of the order, and it was thereupon paid said holder, the presumption that the money was received by her and applied to the benefit of her estate might be overcome by proof that the money was actually paid to the husband by the party receiving it.

It does not impair the negotiability of a note made by a married woman for it to contain a clause making it a charge upon her separate estate.

The burden of proof is always on the plaintiff to show that the contract was for the benefit of the wife's separate estate, and if made by her husband as her agent, that it was within his power as agent.

By an act of the legislature, a married woman is liable for her attorney's fees without reference to the question of actual benefit to her separate estate.

NORTH CAROLINA.—Where an instrument executed by a married woman with the written consent of her husband, does not specifically charge her separate estate, it is necessary to show such a consideration inuring to her benefit, or the benefit of her separate estate, as will necessarily imply such a charge. But if the money borrowed be used to improve the separate estate, a charge will be implied.

A married woman's power to charge her separate estate is limited in North Carolina to the manner and mode prescribed by the instrument creating it; and under the former practice it could only be subjected by a bill in equity—a proceeding in rem not in personam.

A deed of trust, executed by a husband and wife upon her separate estate, to secure the purchase-money thereof and money borrowed to defray expenses of farming operations on other lands, is valid.

OHIO.—Where a married woman, having a separate estate, executes a promissory note as surety for the principal maker, a presumption arises that she thereby intends to charge her separate estate with its payment; but a contract, to charge the separate estate, need not be in writing, though it

must be valid in law, or just and equitable between the parties.

OREGON.—Oregon also adopts the English rule.

PENNSYLVANIA.—A married woman's power over property settled to her separate use cannot exceed the limits prescribed in the deed of settlement, and she has only those powers to transfer and charge which are expressly given by the instrument under which she acquired title.

The act of 1848 conferred upon married women no rights as to the disposition of property settled to their separate use to which they were not before entitled.

To bind her separate property for medical services, employed for the family, affirmative proof of a request by her, is necessary.

RHODE ISLAND.—Intention to charge must be declared in writing, or the contract must be for the benefit of herself or her separate estate.

SOUTH CAROLINA.—It is settled law in South Carolina that a married woman can only dispose of, or charge, her separate estate, in the execution of powers conferred by the instrument creating it.

Where a married woman is to receive an income for her sole and separate use, and no restriction is imposed upon her use and disposition of it, she is regarded as a feme sole as to the same, and may give it to her husband after it has been paid to her. But where a married woman gives a bond to secure the payment of money borrowed by the husband for his own use, it is void, and cannot be enforced against her separate estate. Under the South Carolina Constitution a married woman may alienate her equitable estate in stock held by her

at the time of the adoption of the constitution; and now under the General Statutes of South Carolina, a married woman "may contract and be contracted with as to her separate property in the same manner as if unmarried."

TENNESSEE.—A married woman may freely charge her separate estate, unless restricted by the instrument creating it, but to do so there must be an express intent or agreement, and it cannot be made liable by implication. Thus, though no consideration passed to her, she may mortgage her lands to secure the debt of her husband, and the mortgage will be valid. Where she holds land for life, with power to dispose of it by sale or will, the provision of the act of 1870, giving married women power to sell, etc.; or mortgage their separate realty, provided the power is not expressly withheld in the deed or will under which they hold it, does not give her power to mortgage the same, as under such a settlement the power to mortgage is expressly withheld in the sense of the statute.

In order that a judgment against a married woman may bind her separate estate, the claim or debt on which it was based must be one which would have been a charge on the estate if the judgment had not been rendered. Where a wife had separate real estate both in Mississippi and Tennessee, a Tennessee court of chancery refused to charge the Tennessee lands with expenditures made for the benefit of the Mississippi estate.

A married woman may charge her separate estate by a contract not executed by a privy examination, such as is required in the case of deeds, but in the absence of power conferred by the instrument, a woman cannot make liable for her husband's debt property given to her trustee for her

sole and separate use for life, and at her death to her children.

TEXAS.—It has been held in Texas that where the wife had separate property, and negroes, and there was no common property, and the husband was insolvent and unable to support his family, and purchased goods, wares and merchandise, which were necessary for the wife, children, and negroes, and, afterwards, before the expiration of two years, gave his note for the same, reciting that it was given for the goods, wares, and merchandise furnished his wife, family, and negroes, the separate property of the wife was liable for the payment of the debt, and that, too, notwithstanding the fact that more than two years had elapsed from the date of the account or delivery of the articles, before the commencement of the suit.

But unless for necessaries for herself and family, a wife cannot, by simple contract, even in writing, alone or jointly with her husband, incumber her separate property; though she may mortgage it when joined by her husband.

When a debt is incurred for the protection of the separate property of the wife, to secure which a note is executed voluntarily by husband and wife jointly, judgment may be rendered on the note, directing execution to be levied on the community property, or on the separate property, at the option of the plaintiff. But where the husband has no separate estate, and there is no community property, and the wife rents a house for the use of herself and family, such rent, if of reasonable amount, is a valid charge upon her separate estate.

VERMONT.—There must be some express pledge, or some benefit resulting to the wife or to the separate estate in order to charge it.

The law will not raise an implied promise

against a married woman when she cannot make a valid contract.

A wife's separate estate is not chargeable for money paid by her father to a third person as surety for her husband; nor for repairs made on her house by her father, who lived with her, to suit his own convenience, and for his own benefit, he not consulting her, the repairs being unnecessary, and not adding to the value of the house, and there being no understanding that he was to be reimbursed; but where a married woman promised to allow, in payment of a man's note, services rendered by him in supporting her mother, the promise was enforced in equity against her separate estate.

VIRGINIA.—In Virginia a married woman is considered a feme sole as to her separate estate, unless restricted by the instrument creating it, and it may be charged with her debts and contracts generally. She may cause land to be pledged as security for her husband's debts.

To charge her separate estate for her notes, she must have had such separate estate subject to her jus disponendi when she signed the notes, and must have known of it and intended to charge it. But where she endorsed a negotiable note in blank to enable her husband to make certain purchases, which he failed to do, and afterwards bought a larger amount of goods than was originally contemplated at the time of the endorsement, and filled up the blanks to suit his purchase, the wife was held bound by the endorsement.

The court of equity in enforcing the liability of a married woman's separate estate for her general engagements, will order a sale of the personal estate and the subjection of the rents and profits of the lands, until the debt is discharged.

WEST VIRGINIA.—The separate estate of a

married woman is liable for any simple contract debt for which she would be liable if a feme sole. A consideration for such debt need not inure to her own benefit or that of her separate estate; it may inure to the benefit of her husband or any third party, or may be a mere prejudice to the other contracting party.

Land which is the separate estate of a married woman cannot be sold for debts contracted by her during coverture, but can only be rented during the coverture.

WISCONSIN.—The separate estate of a married woman may be charged in equity with the payment of debts contracted for her benefit.

As has been seen, the contracts of a married woman are enforced in a proceeding in rem against the property, and are not binding on her personally. The property will be charged with any damage resulting to others from failure to keep it in proper repair, or from her careless management; and it has even been held that she would be personally liable.

As a married woman is considered a feme sole as to her separate estate, it necessarily follows that she may sue and be sued in equity in regard to it. She may obtain an order to answer separately as a defendant, have a conveyance fraudulently obtained set aside and may prevent her husband's creditors from seizing her property for his debts. The dealings of a husband with the separate property of his wife are always to be closely scrutinized and will not be upheld whenever slight evidence of fraud or undue influence appears. A wife may present a petition without her husband, and will be bound by her separate answer, or by her settlement of accounts. The trustee should be joined with her, though she had been allowed to sue alone. She

may foreclose in her own name a mortgage that has been assigned to her, although the note is held by a trustee for her use. But the husband should be made a party defendant; especially if he claims any interest in the separate estate, or if any of his acts are in question. She must be made a party to all suits to subject her separate estate or it will not affect her interest.

A judgment recovered by a tax collector, in a suit to enforce a lien against a married woman's separate property for unpaid taxes, could not affect her interest where she was not made a party defendant, and the purchaser at the tax sale under the judgment could acquire no title.

The clause against alienation and anticipation in a settlement in trust for a married woman becomes inoperative upon the termination of the coverture, either by death, or an absolute divorce; and a wife may lose her separate property in personalty by allowing it to be so employed or invested as to become mixed with other funds in such a manner that it becomes impossible to identify or trace it; though a court of equity will throw safeguards around, and see to the proper application of a trust fund, and will follow it so long as it can be clearly and distinctly traced, yet when the means of identification fail, the powers of the court in reference to that fund must also cease.

A wife may lose her separate property by putting it in the husband's possession without any agreement that he shall repay it. Thus, where a feme covert, who had a separate estate, purchased articles of furniture with the rents and profits of such estate, and put them into the possession of her husband without any agreement or understanding with him that he should hold them as her trustee, or that the title should be vested in any other person

for her separate use, the articles thus purchased were held to become the property of her husband and liable to be sold for his debts. But where the trustee of a sum of stock for the separate use of a married woman improperly transferred it into the joint names of her husband and herself, and her husband for six years received the dividends, after which the trustee died, and the husband, without his wife's knowledge, sold out the stock and applied the proceeds to his own use, and afterwards left her, it was held that, though the wife might have been presumed to have assented to his actual receipt of the dividends while the stock remained intact, yet no such assent could be presumed after it had been so sold, and that she was entitled to recover, as against her husband and the estate of the deceased trustee, the arrears of dividends which had accrued since that time, as well as to have the trust fund replaced.

Statutes creating a separate estate for a married woman do not interfere with the separate estate in equity or prevent the creation and existence thereof; the New York Acts of 1848 and 1849 are held, however, to have converted the wife's equitable into a legal estate. The jurisdiction of courts of equity over these estates is not abridged or limited by virtue of such statutes, nor do they affect the construction of a gift in trust for a married woman. The statutes are to enlarge her privileges and not to take away any pre-existing common law right. Thus, in Alabama, all property owned by a married woman is presumptively regarded as her statutory separate property, and the burden of proof is on one asserting her estate to be equitable.

A man took a mortgage from his brother for money loaned. He having died, his widow procured another mortgage to herself from the mort-

gageor, alleging that the money loaned was hers, and surrendering the first mortgage. In a suit by the decedent's administrator to foreclose the first mortgage, it was held that the burden of proof was on the widow to show that it was her money and not that of her husband.

Where property levied on is, as shown by the sheriff's return, in the possession of the husband, but is claimed by the wife as her separate property, the burden of explaining such possession is on the wife. But where creditors of the husband levy on personalty which the wife, who has a separate estate, claims as purchased from a third person with her own means, the burden of proving fraud on her part is on the creditors, and she is not bound to show that the price was paid with her own money, and not that of her husband.

Where a husband without his wife's authority, executes in his own name a bill of sale of her horse and endorsed thereon an order to his wife to deliver the horse to the purchaser, who presented the order and took the horse, the wife neither consenting nor refusing to deliver the animal, it was held, in an action by the wife to recover possession, that the court having charged that the burden was on the plaintiff to prove that the horse was her property, it was not error to refuse defendant's instruction, that, if the plaintiff failed to schedule her property the burden was on her to prove that the horse was her separate property.

But in Illinois it has been held that the married woman's act of 1861 was not designed to abrogate the common law presumption that the husband owns all the property in the possession of the wife while they are living together. If the wife claims the benefit of the act, she must bring herself within its provision by proof. She holds the affirmative

of the issue and must prove it. And it is not sufficient for the wife to prove that she purchased the property from a person other than her husband during coverture, to enable her to hold it as against her husband's creditors. She must also show she obtained in good faith the consideration which she paid for it from a source other than her husband.

And in New Jersey, where a wife, possessed of a separate estate, permitted her husband to carry on business therein in her name, and he collected the income of her separate estate, and made expenditures thereon, it was held in a creditor's suit to subject the wife's realty to the payment of her husband's debts, upon the ground that his earnings had been expended in its improvement, that if the amount expended by the husband on the wife's property was not in excess of the amount of her separate income received by him, the presumption would be that he applied her income and not her earnings to the improvement of her estate.

Whether the possession of chattels by a married woman is prima facie evidence of ownership, is disputed. But it is said that there is no presumption of law that money or negotiable securities in the possession of the wife belong to her husband rather than to her. Where, however, husband and wife are living together, the presumption is that the personal property in the house belongs to the husband. The fact that money earned by the joint labor of the husband, wife, and minor children, on a farm, and from the sale of the produce, was always kept in the personal possession of the wife, does not rebut the presumption that the title thereto was in the husband.

A husband living with his wife is presumed to be the head of the family; and the fact that she makes the contract for board and received the pay

therefore, in the business of keeping a hotel or boarding-house, will not prove the receipts to be her separate property. In Texas, however, where a married woman claimed, as against her husband's creditors a stock of goods, it was held that the presumption was that the goods were community property and not her separate property, and that consequently the burden of proving the goods to be her own was upon her.

In one case, where the circumstances were peculiar, an exception to the rule in the text above was adopted. A husband and wife had died within a few hours of each other. The wife had a separate estate and income. A sum of money was found in the wife's pocketbook, another sum in a pocketbook marked with her father's name; also some money in a bag, and some coin lying loose—all in a trunk marked with the wife's name, to which both had access, the key being usually kept by the wife. Their deeds, bonds, and other papers were also found in the trunk. There was nothing to show the amount contributed by either one to the money so found. It was held that they should be considered as owning it in equal shares.

To overcome the presumption that personal property in the house where husband and wife are living together is the property of the husband, the wife must show that she owned property before her marriage, or that she has acquired it since in a way entirely independent of her husband. A woman who never released to her husband any right in her property owned at the time of the marriage, is presumed to have continued absolute owner, and at her death her real estate passes to her heirs, and her personalty to her personal representatives.

The statutes quite generally agree in making property, real or personal, owned by a married

woman at the time of her marriage, her separate estate. Where an unmarried woman, after acquiring an initiatory right to pre-empt land, marries, and then pays, and takes the patent, the land is her separate estate, and this, whether the money paid belonged to the community or was obtained from the sale of a portion of the land.

A deed conveying land to a single woman sufficiently shows the land to be her separate estate, though followed after her marriage by a second deed from the same grantor to her in her married name, and on an express money consideration.

By the term earnings is meant money or property gained by labor, services, or business management. It is not to be supposed that it was within the contemplation of the legislature in conferring upon married women the right to receive, use, and possess their own earnings, and to sue for the same in their own names, that it was to be limited to such only as should result from manual labor, or that, in conferring upon them the right to have their separate property under their sole and separate control, and to hold, own, possess, and enjoy the same as though they were sole and unmarried, they were to be restricted in its use or disposition. The right to contract is indispensable to the acquisition of earnings, and to the unrestricted possession, control and enjoyment of property. I can perceive of no reason why a married woman, invested with these rights, may not, at least with the consent of her husband, earn money in trade, as well as at the washtub or with the sewing-machine; why she may not as well be the proprietress of a grocery-store, as of a farm; contract debts for goods to be used in trade, as for animals and farming implements, or lands, or farm labor. In removing the common law restriction upon her rights to acquire and control

her property, the legislature has left her to determine, at all events when her husband shall not object, from the dictates of her own judgment, in what lawful pursuit she will engage, and whether it shall be prosecuted alone or in conjunction with others.

Married women's property acts which do not specifically mention her earnings, do not change the husband's common law rights as to the same. So a statute which provides that a wife may earn money on her separate account, does not affect any earnings, of hers, unless they appear to have been acquired by her on her separate account. But the wife's earnings may be secured to her separate use by the assent of her husband, or by a settlement made either before or at the marriage. Or a husband may give his wife her earnings; but such gift must not defraud creditors, and the burden lies upon the wife to prove clearly the gift.

In most of the states' statutes it is expressly provided that the wife's earnings shall be her separate property, free from liability for the debts of her husband. But the married women's statutes cannot deprive the husband of money for the wife's services already paid or due. The right of a wife to hold property is as absolute as that of any other person, and whether she paid anything for it or not, does not concern her husband's creditors, so long as it did not come through, or in some way, from him. Thus, where a wife used in the purchase of real estate her earnings before marriage, saving out of money given her by her husband for household expenses, and money borrowed by her, it was held that the absence of evidence of fraudulent designs towards the husband's creditors, the debts of the husband could not be charged upon the land, the same having been purchased by the wife a year before the debt was contracted.

Where land was conveyed to the wife, and it appeared that she had funds, and the husband had none, and that it was the expectation of all parties that the wife should pay for the land, it was held that the fact that the husband gave his note to the vendor, did not, in the absence of fraud or collusion, prevent the land becoming the wife's separate estate.

A married woman who uses her separate statutory property to purchase real estate, and has the same conveyed to her sole and separate use, does not thereby change the character of her estate, so as to make it equitable.

A wife, who had been declared a feme sole by decree of court, purchased at a judicial sale land which belonged to her husband and which had been mortgaged by him. She paid for it with the proceeds derived from her general estate, which proceeds had never been reduced into possession by the husband. It was held that the land so purchased was not bound by a judgment obtained against the husband upon a debt created by him prior to said purchase.

In Alabama, the services and earnings of a married woman belong presumptively to her husband and after his death to his personal representative. To enable a wife to maintain a suit for such earnings, she must allege that her husband's estate had no creditors, or else that his debts were paid, and also allege facts showing a relinquishment by the husband, express or implied, of the earnings to her.

In Georgia, it was held that the earnings of a married woman prior to 1866, where she was not a free trader and did not live separately from her husband, belonged to her husband; and that, where he bought land with such earnings in his own name,

no trust in the wife's favor could be implied as against a creditor of the husband whose debt was contracted after the purchase of the property, and who had no notice of an alleged trust.

In an action to recover of executors for ten years' services as housekeeper for the testator, who was plaintiff's father, it appeared that she had separated from her husband, and supported herself by her earnings. It was held that she was entitled to bring the suit, the wages belonging to her.

If a married woman appropriates to the payment of her husband's debts the earnings made by her for services performed on her sole account, she cannot reclaim them.

In West Virginia, where a married woman, who claimed the fund garnished for the debt of her husband, had no separate estate, and there was no marriage settlement, and it appeared that the money claimed was earned by her, while living with her husband, and in part was acquired by her by raising cattle on her husband's farm, and that another part was given her by her son before the adoption of the law providing for separate estates of married women, the money was held to be the property of the husband.

Under the Indiana law entitling a married woman to the earnings of her separate business, she may buy a note with such earnings, and her husband's endorsement will pass the title of the note to her, so as to enable her to sue the maker.

The equity obtained by a wife who has purchased land, paying part of the purchase money, and taking bond for title on payment in full, is her statutory separate estate.

The provision of the Rhode Island statutes that property acquired by a woman after marriage by her own industry, shall be absolutely secured

to her sole and separate use, is sufficient to enable a woman to recover for board furnished by her father after her separation from her husband and before her divorce.

But in some states the wife's earnings are held to be her separate property free from liability for the debts of her husband only where the husband fails to provide for her, or where, for other reasons, the wife lives apart from her husband.

The earnings and accumulations of a wife living separate from her husband are her separate property. But the fact that a note and mortgage were given by a wife while living apart from her husband, does not of itself prove that the lands described in the mortgage were her separate property.

A husband left his wife on account of domestic infelicity, and resolved during his absence never to resume marital relations with her, but to provide for his family when necessary. The wife and children lived together, supported by her exertions. It was held that this was a separate living within the California statute providing that the wife's earnings, while she is living separate from her husband, shall be her separate property.

The California Act of March 9, 1870, which provides that while the wife lives separate and apart from her husband she shall have the sole use of her property, and may sue and be sued, etc., does not apply to a case where the wife is temporarily absent from her husband with his consent, but to cases where there has been an abandonment on the part of the husband or wife, or a separation which is intended to be final.

An agreement between husband and wife that the wife's earnings in any special transaction shall

belong to her, vests in her all claim on account of such service.

In a Minnesota case an agreement between husband and wife that the latter should receive the compensation to be earned by her in nursing a boarder in the family who paid the husband for his board, was held to vest in her any claim accruing on account of such nursing, and, there being no question of set-off or counter-claim, it was considered to be immaterial that the boarder did not know of such agreement.

If a husband consent that his wife may take boarders into the family, and that she shall have the gross proceeds for application on a contract which he has made with a third person for the purchase of real estate, and if the money so acquired by the wife be thus applied, the money is hers, and not his. If, on completing payment, the wife takes the conveyance of the premises to herself from such third person, her title will prevail against a creditor of her husband who gave credit after the property was paid for, though the conveyance to her be of later date than the giving of such credit.

The product of all labor of the wife for persons other than her husband, belongs to her, and the fact that the husband acted as the wife's agent in contracting for the rendering of services by her, does not affect her individual claim for compensation. A wife can contract for her services, and sue alone on the contract, making her husband, if need be, garnishee. But the married woman's statutes do not impliedly authorize her to contract with her husband for her services, and she cannot recover from him for services rendered, unless contracts between husband and wife are by statute expressly authorized. A wife's earnings, however, in connection with her husband's property, by keeping boarders,

selling butter, milk, etc., are his, not hers, and property bought with them may be reached by his creditors.

In Missouri, services rendered by a wife for another, for compensation, are, both by statute and common law, presumed to be performed on the husband's behalf.

A wife may lawfully contract with a firm of which her husband is a member, to run a boarding-house for it for a share of the profits, and the shares so earned by her will be her separate estate.

The profits, rents, increase, products and interest of statutory separate property are also separate property, whether the statute says so or not. But in Texas the interest of money acquired by gift, devise, or descent, is held not to be property acquired by gift, devise or descent, and consequently not the wife's separate property. In Alabama a statute giving the husband, as trustee of the statutory separate estate of the wife, the right to control it without liability to account to the wife for the rent, etc., but not subjecting such rent, etc., to his debts, it was held that land purchased in the name of the wife with such rent could not be made liable for the husband's debts.

The rule applies both to realty and personalty. The Minnesota statute provides specially that the rents, profits and increase of real estate shall be the wife's property. It was held under this statute that the naming of the increase of realty did not exclude the increase of personalty. Hence the wife can maintain replevin against any creditor of her husband, or against any officer who seizes the property of her separate estate.

Where a husband helps to farm his wife's land the crops are presumed to be hers, not his. And the same is true where a married woman owns and

occupies a farm; the mere fact that her husband lives with her on the farm and assists with the cultivation and management, will not warrant an inference that the crops vested in him. The wife's right, therefore, through the profits is not affected by the fact that the husband assisted in earning them. To illustrate,—the fact that a business belonging to a married woman is profitable mainly through the labor, energy, and skill of her husband, who is its general manager, does not make the profits liable for his debts, so long as the parties are acting in good faith.

In some states the increase of statutory separate estate is provided for by statute. Thus, in Alabama a husband has full power thereover and is not accountable to his wife for her rent and profits.

The general rule is that property purchased with the wife's money belongs to the wife, and is not subject to the husband's debts. This is especially true where the property was purchased out of the earnings of the wife prior to her marriage. Where real estate was bought by a woman with her own means, and before marriage conveyed to a trustee to hold for her, and to be conveyed upon her written request, such estate was held to be her separate property. Where the purchase was made with money acquired subsequently to the marriage, there are, in some states, qualifications of the rule, such as that the earnings must have been derived from an employment by a third person. Thus in Kentucky, unless the wife's earnings are derived in this way, such earnings belong to the husband and lands purchased with them will be subject to the husband's debts.

The fact that property was purchased in part with the wife's funds does not confer the entire ownership upon the wife, although it seems that

she will be considered to own such a proportion in the property bought as the funds furnished by her bear to the whole price. In an Alabama case it was held that where the husband mixed some of the income of his wife's statutory separate estate with moneys of his own, purchasing lands and taking title to himself, this fact did not give the wife ownership in the property so purchased.

But where at the time of the marriage the wife contributed from her separate property all the stock and capital of the business, except a few goods put in by the husband, and the stock on hand at his death was less than the amount of her original investment, it was held that the stock was her separate property. But if there is no way of distinguishing the property purchased by the wife, the whole is presumed to belong to the husband. Property bought with money lent by the wife to her husband belongs to the husband. To illustrate,—A lent money to her husband to do business with. He formed a partnership with B, A furnishing no more money until she bought B out, her husband then having entire control and management of the business and having an equal interest with her therein. After buying B out, she purchased certain goods which were levied on upon an execution against the firm. It was held that she could not replevin the same as her individual property.

In another case which was an action by a wife to recover from her husband money alleged to have been paid by her in building and furnishing their house, complainant testified that, when she gave defendant the money, she told him to pay it on her home, "he took the money and paid it out. It went into the house. It was for the purpose of paying the contractor." This was held to be inconsistent with the idea of a loan or trust.

A loan of money by a married woman to her husband, prior to the Illinois Married Woman's Act of 1861, would invest him with the ownership, and she would cease to have any interest therein; but a loan made after that act makes her simply her husband's creditor, and if he invests the money in land in his own name no trust results in her favor.

The husband, as well as the third person, may act as the wife's agent in making the purchase of property. Where it appeared that at the time of the decree making the wife a feme sole, she owned no property at all, and that her husband subsequently bought goods and conducted business in her name, realizing large profits, it was held that the property was subject to the husband's debts.

The right of the wife to her property is not affected by the fact that it has been listed by the husband for taxation as his. Property bought by a wife, in her name, after the institution of her suit for a divorce and separation of property, which were subsequently decreed in her favor is presumed to be her separate property.

Acquisition by gift is quite generally enumerated in the statutes as one of the methods by which a statutory separate estate may be acquired; and where property is given to a wife, the presumption is that it was intended to be for her separate use. In Massachusetts a promissory note made payable to a married woman at the request of her husband, upon a consideration moving solely from him, is a voluntary gift from him, and she does not acquire a title to it as her sole property free from his control, and cannot maintain an action on it in her own name. A gift for the "sole" use of a woman is equivalent to a gift for her "separate" use, no technical words being requisite in such a case. It has been held that "gift" has the same meaning as "gift

or grant," and that a gift of personalty may be by parol.

Real estate conveyed to a married woman is her separate legal property, and the instrument need not contain words showing that the property was meant to be separate. If the grantor is the husband the conveyance must not be to the prejudice of his creditors, but the consideration must, as a rule, be advanced by the wife. Thus, the mere recital in a deed from a husband to his wife that a valuable consideration has been paid to the use of the husband from money of her statutory separate estate does not create in the wife the statutory estate in the land, unless the consideration was in fact paid as recited.

Property acquired by the wife by exchange is as much her separate estate as property acquired by purchase. Thus, personalty received in exchange for other separate property is itself separate property. Under this head may be put the conversion of the wife's land and the money, in which case the proceeds will be her separate estate, notwithstanding the lands may have been acquired by the wife during marriage, and before the passage of the married woman's law of Alabama.

Property acquired by a married woman, by devise, bequest, descent or distribution is her separate statutory estate. Under this head is included a distributive share which vested, before the wife's marriage, upon her father's death, but was not paid until after the marriage.

Property conveyed to the husband in trust for his wife is her statutory separate estate. Whenever a husband obtains possession of the wife's separate property, whether with or without her consent, he is deemed in the absence of evidence that she intended to make him a gift of it, to hold it in trust

for his wife. Where the husband purchases property for the wife, the presumption is that the money invested is the wife's separate estate. A husband who invests money received by the wife as a gift from her father, and takes title to the property so purchased in his own name without her written consent, is merely a trustee for the benefit of his wife.

A policy of life insurance taken out by the husband for the benefit of his wife is, generally, under the statutes, her separate property.

Choses in action may form part of a married woman's separate estate, and may be acquired in any of the ways enumerated; as, by purchase, exchange, etc.

The statutes enlarging the rights of married women and providing for their separate estate are broad enough, generally speaking, to embrace damages arising out of torts to their persons or property.

Where a wife owns separate property in one jurisdiction and moves with her husband into another, such property remains her separate estate. But in the absence of evidence of what is the law of the state from which part it came, the common law rules will be applied.

The legislature, in creating a separate statutory estate for the wife may, and usually does, provide the mode for its disposal. A provision that, as to such property the wife should have the same rights and powers as if unmarried, has been held to give her power to convey and dispose thereof freely without the husband's consent, save only that to pass his curtesy he must join in the deed. But provision that it should be under her sole control, and held, owned, possessed, and enjoyed by her the same as though she were sole and unmarried, or that it should continue hers as fully after marriage as before, have been held not to give her the power of

disposal without the husband's consent, though she could execute a lease thereof for a term of years.

As a general rule a married woman may charge her statutory separate estate with her debts and contracts made in reference thereto. To illustrate,—An agreement by a married woman to pay for the board of her husband with her earnings is binding on her, though her earnings are her separate property. A contract to build a house on her land is one in reference to her separate property, and when signed by herself and husband she will be liable upon her acceptance of an offer drawn upon them jointly by the contractor. The intent to charge may be inferred from the surrounding circumstances, a specific agreement not being always necessary. To illustrate,—In the absence of evidence to the contrary, it will be presumed that money borrowed by a married woman on a post-dated check, she having a separate estate, carrying on business in relation thereto, and keeping a bank account in her own name, was borrowed for the benefit of her separate estate, and she will be held liable therefor. Where a butcher refused to give further credit to a husband, and the wife, who conducted the household affairs and had a separate estate liable to be charged with the debt, though she carried on no separate business, said in reply to his remark that if he wanted to run a bill he would charge it to her, "you will not get cheated out of it, if you do I will see you paid"; it was held not to be a sufficient indication of an intent to charge the separate estate, and the butcher could not recover. In some states she must have a separate estate in order that her contracts may be enforced against her. She may be liable upon her contracts though not charged upon the separate estate, where they inure to her benefit or that of the estate, or for necessaries furnished the

family. Whenever she buys goods on credit, she benefits her separate estate to the extent of the purchase, if she had no separate estate before she acquired one by the purchase. In Pennsylvania she may bind her separate estate for services necessary in harvesting, housing and marketing a crop; and her recorded contract for supplies for her separate plantation binds the crops grown that year. She may bind her separate estate by contracts of suretyship, unless disqualified by statutes, and, if the statute gives her the general power to contract, it will, of course, include the power to confess a judgment. The separate property will be charged with the costs of the suit brought by the wife in respect to it, and she may bind it by an agreement to pay attorney's fees.

As a general rule in those states in which the rule of the common law, respecting the power of a married woman to bind herself by contract, has been modified by statute, a promissory note made by a married woman as principal or surety, or endorsed by her, is binding upon her separate property. A married woman is not bound as a surety upon a note, unless it appears that she became such with an intention to bind her separate estate. In Indiana the rents and profits of a married woman's separate estate cannot be subjected to the payment of a note executed by her, where, by the note itself, she agreed to pay from her own separate property the amount stated therein. In Virginia, the contracts of a married woman, including her promissory notes, are enforceable only against her separate estate owned at the time of entering into the agreement. Although a note given by a wife for her husband expressly binds the wife's separate estate, a policy of insurance on the husband's life is not covered thereby, since, until the death of her hus-

band she has no such interest in the policy as can be the subject of a charge. Where a married woman endorsed upon a promissory note: "I hereby charge my separate and personal estate for the payment of the within note," the instrument was held not to be a mortgage, in any sense, but simply a personal security which a national bank is not prohibited from taking. And the same is true of a note endorsed for her accommodation or endorsed by her for the accommodation of her husband. The rule includes also a note made by her jointly with her husband, unless it appeared that she signed the note only because her husband asked her to, and without knowing the use to be made of it. In some jurisdictions, however, the rule prevails that a married woman's promissory note, in order to be valid, must be for the benefit of her business or estate, or must have been made with reference to her separate property. But it has been held that the fact of a wife signing a note with her husband is prima facie evidence of her intention to charge her separate estate.

When a married woman is not allowed by law to enter into a contract with her husband, a note given to him is not binding on her statutory separate estate; and when she is not empowered to make a contract of suretyship, she cannot be held liable upon her endorsement given to secure the debt of another.

A mortgage executed by the wife upon her statutory separate estate is binding; but in some states with the qualifications that it must have been given to secure debts contracted for her own benefit or for the benefit of her estate, a married woman may mortgage her land to secure her husband's debt; if, however, she gives her note for the debt and gives a mortgage to secure the note, the note

being void, the mortgage cannot be enforced. Where a married woman inserted in her mortgage a declaration that she "hereby makes a payment of the moneys, hereby secured, a charge upon her other sole and separate estate," it was held that her other separate estate was not thereby charged as against one afterwards purchasing it in good faith and for value.

Where a husband and wife join in a mortgage, the wife's separate estate is similarly bound. In those states in which a married woman is not allowed by law to charge her separate estate for the benefit of her husband, a mortgage given for a debt of the husband is necessarily void.

A married woman may manage her separate estate as well by agent as in person, and may appoint her husband. She will be liable for any debts or charges incurred by him in the management of the estate, but the authority must be shown. The separate estate of a married woman cannot be charged with the debts of a company, to the amount of stocks standing in her name, where the stock was entered on the books of the company by the authority of her husband, a director, who voted and represented it, and it did not appear that she had authorized or ratified his acts, or claimed any interest in the stock, or received any dividends therefrom; and it is a question for the jury whether upon the evidence the agency was authorized. A party who credits the husband individually may charge the wife upon discovering his agency.

If a wife avails herself of the result of her husband's fraud, while acting as agent in reference to her separate property she is liable therefor as though unmarried; and where he knowingly leased her real estate for the unlawful sale of liquor it was held

that the state had a lien thereon for the fines imposed on the seller.

The power of a married woman to will her statutory separate property is usually regulated by the statutes creating the estate, most of the separate property acts giving her the authority to do so.

As a general rule, it may be said, the statutes of the different states exempt the wife's statutory separate estate from liability for the debts of the husband, and, in the absence of fraud, his creditors have, generally, no rights whatever against the property. Not even where the separate property consisted of store fixtures and other utensils which she permitted her husband to use in his business. But where she gives her husband the use of her farm and the personalty thereon, his creditors may attach hay severed by him from the land before the license is revoked. And where a married woman went into business with a stock of goods purchased with her separate means, and bought on credit and in her husband's name, and replenished the stock from time to time, and so continued for several years, and it could not be shown how much of capital and how much of profits were used by her in keeping up the stock of goods, it was subjected to her husband's debts. And so, also, where land was purchased in the wife's name with the husband's money after a debt accrued on which a judgment was founded.

In Alabama the wife can neither sell or mortgage her separate property for the payment of her husband's debts.

In Louisiana a married woman may bind her separate estate by an engagement to pay the debt of her husband, by complying with the Louisiana statute enabling married women to contract debts. But a married woman, even though separate in property, cannot be held liable for a debt contracted

by her husband, unless it be affirmatively shown that it inured to her separate benefit. The husband may labor upon the wife's statutory separate estate as her agent or even make improvements thereupon, without, in the absence of actual fraud, making it in any way liable for his debts. In some states the wife cannot even charge her separate estate for the husband's benefit, although in others she may do so. The wife's property not being liable for the husband's debts, it is a fortiori not liable for his torts.

The husband has no power to make a transfer of, or create a charge upon, his wife's statutory separate property, and if he assumes control of it will be accountable to her for the principal, together with the income and profits. In New York, the husband, who is not a tenant by the curtesy has no interest in the lands of his wife during coverture, and if he remains in possession and control after the wife's death, he is liable to the heirs of the wife for rents.

Where the statute creating the separate estate of a married woman gives her power to hold, convey and devise as fully as if a feme sole, the husband's curtesy will be defeated if she makes such conveyance or devise; but if she dies intestate, not having conveyed the property it would seem that the husband will take for his life as tenant by the curtesy, to the exclusion of the heirs of the wife. Where it is the evident intent in making a settlement of an estate upon a married woman that she shall hold it as a feme sole, the husband cannot have the curtesy; and it has been held that the husband could not have curtesy of real estate conveyed to the wife for her sole and separate use, with power of disposal, and who has so disposed of it.

CHAPTER VIII.

COMMUNITY PROPERTY

All property acquired by the husband or wife during the marriage is community property; it includes the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations, made jointly with them both, or by purchases, or in any other similar way, even although the purchase be only in the name of one of the two, and not of both; because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. The increase of animals belongs to the community. Property purchased during marriage, whether by the husband or wife, is community property, and not the separate estate of the purchaser, unless made with separate funds.

Conventional community is that which is formed by express agreement in the contract of marriage. It is immaterial whether the property stands in the name of both of them.

Legal community is that which, in the absence of any agreement, exists by force of law as soon as the marriage relation is established. Land purchased after the death of the wife and paid for with community funds becomes community property. The surviving husband and children hold as tenants in common.

A crop growing at the time of the dissolution of the marriage is community property.

No property acquired by the wife during coverture becomes her separate estate, except such as is derived by gift, devise, or descent; all acquired in any other manner is community property.

In California property acquired after marriage becomes community property, unless it be acquired by gift, descent, devise, or bequest, or on the credit of the separate estate.

In Texas the increase of all separate property, except the increase of lands, is community property.

Property purchased during coverture by a wife with the rents and profits of her separate estate are not subject to any marital rights of the husband.

In California the increase and profits of the separate estate of husband and wife and loans made to the wife upon the faith of her separate property are separate property; but in Texas they are community property.

In Louisiana the increase of separate property becomes community property.

The central idea of the community system is that marriage creates a partnership in property between husband and wife, and that all property resulting from the labor of both or either of them, and all property vesting in them or either of them, except by gift, devise, bequest, or descent, inures to the benefit of both of them; and though community property has not all the incidents of partnership property, it has many of them, and is commonly spoken of as partnership property.

The doctrine of community property had its origin in the Civil Law, but those states and territories which have adopted it took it directly from the old French, Spanish, or Mexican law. The doc-

trine is at present recognized by statutes in California, Louisiana, Nevada, Texas, Arizona, Idaho, Montana and Washington. It formerly existed in Missouri. The various statutes are to a large extent declaratory of previously existing law, and construed alike in several states. These statutes take effect only in the absence of agreement between the parties, as they may establish their property rights by contract.

All property acquired during the existence of the community, and all property in the possession of either spouse during coverture, is presumed to be community property. These presumptions may be rebutted, but it must be by clear and satisfactory evidence, and the burden of proof is upon the party alleging that the property is separate property.

In California a purchaser from the husband, of land deeded to the wife for a valuable consideration, does so at his peril, and it may be shown that the property was the separate property of the wife.

The husband and wife have equal interests in the community, though during coverture the wife's rights are passive, and he has full management and control of the property, and may deal with it almost as if it were his own. He is its sole representative, and is liable for its debts. It is liable for its separate debts. He has full power to dispose of it absolutely without her consent; his sole deed passes community realty; his sole signature assigns community promisory notes, though standing in her name; in his sole name he sues in ejectment, and enforces a promisory note; he may give the property away, but not with the intent to defraud her of her rights, in view of divorce or of death, though her remedy in such case seems confined to a bill quia timet. He may give or assign community property to his wife to be her separate property

where there is no fraud on creditors; and the property and his widow are bound by his estoppel. The husband cannot affect the interest of the wife by will, or by any instrument to take effect after his death; and after the death of the wife he cannot dispose of the community except to pay the debts thereof or to the extent of his own interest. If there be community debts, the survivor of the community may appropriate community property to their payment; and his power to wind up community affairs is so far recognized, that sales fairly made by him for that purpose will not be set aside. His power to sell is dependent on the existence of some claim against the community, and whosoever purchases from him must see to it that the facts exist which authorize the sale.

Divorce proceedings alone do not affect his rights, though his abandonment of his wife may give her important powers.

When the husband deserts the wife, ceases to discharge his marital duties, and contributes nothing to her support and to the support of the children, the power to manage, control, and dispose of the community property for purposes of support is transferred to the wife. In such a case the discretion exercised by the wife in selling the community property will not be reviewed, unless it has been used to perpetrate a fraud on the husband's right. It may safely be said that the abandonment of a wife by her husband perfects all her rights in and to the community property as effectually as if he were dead. The sentence of a husband to the penitentiary, and his confinement there, is equivalent to an abandonment of the wife, and authorizes her to manage and dispose of the community property, at least so far as to secure a support for herself and children.

In case of divorce the property is divided; a mere cause for divorce does not forfeit the rights of either party, and after divorce the husband has no powers over the wife's interest.

The wife's rights over the community are as well defined and ascertained as those of the husband; though once called "a mere expectancy," her interest is equal to that of her husband; and she may protect herself by all the remedial processes afforded to anyone.

A wife, under the liberal provisions of the constitution and laws of Texas for the protection of her separate property, may, in her own name, maintain a suit by attachment levied on community property belonging to herself and her husband, to secure payment of a debt which is her separate property due from the husband. While this is true, such a claim, sought to be enforced by attachment, should be closely scrutinized, to guard against fraud and collusion between husband and wife to defeat creditors.

During coverture she cannot dispose of the community without his consent; her mortgage thereof even as to her interest is void in California, though if she survives her husband it may be enforced against her. With her husband's death her rights spring into activity, and she has all the powers of a feme sole over her interest; so, under the various statutes she may, for cause, have a separation of property, a partition of the community, or may be awarded alimony out of it, or may have a divorce with a division of the property. So if her husband abandons her and refuses to support her, her rights over the community quicken into vigorous activity; she may deal with it in his place, and she may even in her own name convey real estate standing in his name, so that subsequent bona fide purchasers from him will get nothing.

The survivor has at least one-half of the community property after all the community debts are paid, the community property being a primary fund for the settlement of community debts. The survivor may generally settle up the community with or without statutory authority, and with or without going into court. The survivors or the heirs of the deceased can assign their respective interests, but not by metes and bounds, as dissolution of the marriage turns the community into tenancy in common. Either spouse may by will dispose of such part of the community as would go to his or her representatives, but neither can by will affect the interests of the other. A married woman may dispose of her property by will, subject to the liability of her community property for the payment of community debts. In Louisiana the surviving wife may enjoy the use of the community during widowhood, and the survivor has a usufruct of so much of the community as may be inherited by his or her issue proceeding from the marriage.

Upon the death of either spouse the heirs of the deceased take one-half of the community property subject to the payment of community debts, the survivor's homestead rights, and the survivor's right of administration. The heirs of the wife become vested with a title to her share of the community property at the moment of her death; and though they receive it subject to the payment of the community debt, they are bound to await a liquidation of the community before resorting to an action to recover it. Nor, in such action, petitory in its character, is the indebtedness of the community, or its financial condition when dissolved, a legitimate subject of inquiry. As has been often said, heirs take community property charged with the debts against it; and if it be sold by the survivor for the

purpose of paying community debts, or for the purpose of reimbursing the survivor for separate means used in discharge of such debts, then the purchaser will be protected in his purchase.

On the death of the wife her interest in the homestead descends and invests in her heirs, subject to administration and to the right of the husband to wind up the community affairs. This right of the husband must be limited chiefly to paying the community debts, and a purchaser from him does not acquire the interest of the children of the marriage when there were no debts of the community to be paid. A sale to support the children will not be sufficient to pass title to their interest in the homestead.

In Louisiana a child cannot, since the passage of the laws of 1884, sue for her deceased father's community interest while her mother remains a widow.

Where a wife dies seised of community estate, and leaving children, her interest in such community estate descends to and vests wholly in her surviving children, to the exclusion of surviving grandchildren whose parents died before the ancestress did.

Upon the death of either spouse the heirs may apply to the court to restrain the survivor from wasting or improperly disposing of the property, after the surviving husband has regularly filed his inventory. If it appears that he is about to waste the property, the heirs may apply to the court and have their rights protected.

In Louisiana the heirs may accept or renounce the succession. The heirs also have a claim for any separate property of the deceased which has been taken into the community or by the survivor.

The community property is liable for the wife's

ante-nuptial debts, but not on any contract of hers made during coverture, except for necessaries. The community property is liable for the sole debt of the wife contracted before marriage; and it has been held that interest paid on a stock loan which was a personal debt of the wife was chargeable to the community. The property is likewise liable for all ante-nuptial and post-nuptial debts of the husband; as he can dispose of it absolutely, he can absolutely charge it with his debts.

As an entirety, it is not liable for any debt contracted after dissolution of the marriage. All the debts for which it is liable must be settled before the survivor or the heirs of the deceased have personally any interest.

In Louisiana if the widow accept the community, she or her estate is liable for one-half of the debts, but if she renounce the same, neither she nor her estate can be held liable at all. A judgment against both husband and wife can be enforced against the community property or against the separate property of either one; but if a mortgage has been given for the husband's debts, which covers both community property and separate property of the wife, she may have the community property exhausted first.

Where a judgment is recovered against husband and wife jointly without any specific directions in the decree as to the estate out of which it is to be satisfied, it would seem that, as a general rule, it may be levied upon and be satisfied out of the property of either the husband or wife or of the community.

Judgment creditors cannot have a part of the community property set aside by metes and bounds to satisfy their debts.

If by the terms of a trust deed the separate property of a wife be liable, all community property which is subject to the same lien must be exhausted before the separate property of the wife can be taken.

In a foreclosure suit against the community the wife should be made a party.

CHAPTER IX.

DOWER

Dower at common law is the life estate of a wife in one-third of all the legal estates of inheritance of which her husband is seised at any time during coverture, and which any issue of theirs might directly inherit. It has three stages, namely: (1) its inchoate stage, extending from the time of the marriage, or the acquisition of the property in question, to the time of the husband's death; (2) its consummate stage, extending from the death of the husband; and (3) its assigned stage, extending from the time it is set off to the widow.

The word "dower" both technically and in popular acceptation, has reference to real estate exclusively. At first dower is said to have consisted of personalty; but at a later period, not distinctly ascertained, it became solely an interest in lands. The portion of land allotted as dower likewise varied at different times, consisting of one-fourth, one-tenth, and one-half, before it became settled at one-third for life. This was due to English statutes, which, as a part of the common law, were generally adopted in the United States.

The custom of conferring upon a widow for life a portion of her husband's property, or allowing her dower, is universally conceded to be of great antiquity;—so ancient, that neither Coke nor Blackstone could trace it to its source. It is said on the one hand to be of German origin, while on the

other hand its introduction is ascribed to the Normans as a part of their local tenure.

The provision of the common law entitling the wife to dower in her husband's lands was intended for the sure and competent sustenance of the widow, and the better nurture and education of her children. Courts have always highly favored the widow's claim for dower. It is a legal, equitable and moral right, and next to life and liberty held sacred.

In order that the wife's right to dower may be consummate, vested and absolute, the husband's death must occur before hers, and it must be natural death; civil death will not give dower, nor is an absolute divorce the equivalent of death in this connection. No dower rights can attach to property before the husband is seised thereof; a mere right of entry into land held by another under claim of title was not enough. Wrongful seisin is generally sufficient to give the wife dower as against her husband's heirs and assigns. The husband's seisin must be beneficial, and he must be seised for his own use. To illustrate:—A wife has no dower in lands held by her husband as administrator or trustee; but if the seisin be beneficial, it matters not how short a time it lasts. Still, if in one transaction, though by different deeds, the title passes in and out of the husband, as when property is purchased and a mortgage given for the purchase money, the seisin is merely transitory, and no right to dower attaches. The seisin must be sole and not joint; there is no dower in joint estates, though there is in estates in common and in coparcenary, but if the joint estate is destroyed by any other means than the husband's assignment, dower attaches.

The seisin must be the immediate seisin of the inheritance.

The seisin must exist at some time during coverture, but it need not, except by statute, exist at the husband's death. If the husband gives a bond of conveyance before marriage and convey in accordance therewith after the marriage, the second conveyance dates back to the time of the bond and there is no dower.

Dower attaches to all hereditaments, corporeal or incorporeal, which savor of the realty. It attaches therefore to mines already opened, whether they have been abandoned, closed or not; but the widow cannot open mines. She may have dower in wild lands; in land covered with water; but there is no dower in shares of stock in corporations, generally; and none in annuities not charges on land, and none in grass, fruits, and spontaneous productions of the soil growing at the husband's death. By statute there was dower in slaves.

Absolute fee-simple estates are subject to dower. Estates in remainder or reversion expectant on a freehold are not subject to dower, but those expectant on a leasehold are. Estates in common, and in coparcenary are subject to dower, but joint estates are not. There is no dower in bare legal estates, or in equitable estates at common law, or in partnership estates or in estates for years, or in estates at will, or in estates of preemption.

At common law dower attached only to legal estates; the husband, as has been seen, had to be seised of the legal title. All kinds of uses and trusts were, therefore, exempt from dower, such as trusts created by deed or will, equities of redemption, and lands paid for but not formally deeded. The common law rule still prevails in Connecticut, Delaware, Florida, Georgia, Maine, Massachusetts, Michigan, New Hampshire, Oregon, South Carolina, Vermont and Wisconsin. In Pennsylvania this rule

has never existed. It has been abolished by implication in Arkansas, and expressly in England, Alabama, Illinois, Kentucky, Maryland, Missouri, New Jersey, New York, North Carolina, Ohio, Rhode Island, Tennessee, Virginia and West Virginia.

Statutes giving dower in equitable estates are remedial, and are applied to estates owned by the husband before the passage of the statute, if the rights of third persons have not intervened. In Massachusetts dower is given in equities of redemption, and in property in which the husband has a complete equitable title.

Equitable estates must be distinguished from equitable rights, for even under the above statutes, there is no dower in a mere right. Therefore, to entitle the wife to dower, the husband's equity must be perfect and complete,—an interest which would pass to his heirs, and not a mere right of action which would pass to his personal representatives. Thus, there is dower in land which a husband has bought and paid for, but the deed to which he has lost before recording it. And it must be such an equitable title that equity would decree the legal title, other rights not conflicting, and not a mere moral right depending upon an unenforceable contract or trust. The question has repeatedly arisen in cases where the husband had not completed a purchase at the time of his death, but had paid a part or the whole of the purchase money; and in such cases the wife's right to dower depends very much upon the terms of the contract. To illustrate: When the husband has paid all the purchase money and is entitled to a deed, and could in equity obtain a decree of specific performance, the wife is entitled to dower; and when none of the purchase money has been paid she has no dower. But there is considerable dispute as to the effect of a part-payment

of purchase money. Some cases hold that all the purchase money must be paid. The true rule seems to be that if the terms of the contract give the husband the right to the property only after the payment of all the purchase money, his wife can have no dower unless all the purchase money is paid; but when he has taken possession of the property after a part payment, and the vendor has retained the title only as security, or has relied on his lien for the purchase money, the wife has dower subject to the vendor's rights.

Dower in equitable estates differs from dower in legal estates, generally, in that the husband must die seised of the former to entitle his wife to dower. This seems to be the general rule under the statutes. If he has aliened an equitable estate, his wife not consenting to the deed, absolutely or by mortgage or other incumbrance, he has defeated dower absolutely or, pro tanto. And a legal title acquired by the husband after he has so disposed of, or incumbered the equitable estate inures to the benefit of the assignee, and does not perfect dower.

It has been a much vexed question whether and to what extent dower exists in partnership real estate. Some cases hold that partnership real estate is personalty, and that there is, therefore, no dower therein at all; others hold that real estate is real estate though owned by a partnership, and is therefore fully subject to dower. But the true rule seems to be that realty bought with partnership funds or for partnership purposes is realty at law subject to dower, just as if the partners were tenants in common, unless the terms of the partnership agreement declare it to be personalty; but that in equity it is subject to a trust in favor of the partnership creditors and of any of the partners with a balance due him, this trust being paramount to any dower

claims, and there being no dower if the property is needed to pay the firm creditors, or to pay any partner a balance due him; but there being dower, if the property is not needed for such purposes, or in the surplus, if it be so needed, only in part; provided, however, that if the property is sold under the partnership equitable lien during coverture, as in the case of the enforcement of other paramount liens, dower is defeated; and that the wives of the partners do not have to join in any deed of the partnership property, or be made parties to any suit when the partnership property is foreclosed or otherwise attacked by the partnership creditors. If there is an express agreement that the realty of the partnership shall be used for paying the debts of the firm, the property is undoubtedly subject to the trust above described. It is well settled that such an agreement is always implied, so that the property vests in the partners subject to an equitable lien, which is, therefore, prior to dower. If the lands are sold under the partnership lien, the widow has no dower in rents and profits accruing before the sale. The realty must, of course, be partnership property or it will be subject to dower as any other realty. If bought by the partners, it is prima facie partnership property; it is such property if bought with partnership funds, or for the use of the firm; but it is not, if bought for and charged to one partner, or, if taken in common by express agreement.

Where land, which would in ordinary circumstances be subject to dower, has been mortgaged, a mortgagee's interest is personalty, and his wife can have no dower in the property, unless he has perfected his title thereto by foreclosure during his life. The mortgagor's interest, on the other hand, until default or foreclosure, is, generally, under the terms of the usual mortgage, a legal estate on condition,

and his wife takes dower subject to defeasance by breach of condition. After default the mortgagor has, generally, only an equitable title or estate called an equity of redemption, and at common law there was no dower in equities of redemption or in any other equitable estates; but now, as has been seen, equities of redemption are subject to dower. This applies, of course, to only such mortgages as are paramount to dower; that is, whether the land was bought subject to the mortgage, or the mortgage was made by the husband before marriage or after marriage without her joinder, as a part of the transaction that vested the property in him. If the mortgage is made after marriage without the wife's joinder to release her dower, she has her dower as if the mortgage had not been made, as she would if the property had been conveyed absolutely and not by way of mortgage.

Where the wife has her dower in mortgaged land subject to defeasance by breach of condition, or has dower in the equity of redemption, and her husband dies without default and foreclosure, she may be endowed out of the lands and hold them until default and foreclosure. But if there has been default and the mortgagee has taken possession the widow cannot disturb him and have dower, but she has certain rights in case of redemption or a foreclosure sale.

Where the husband dies seised of the equity of redemption and the mortgage is in default, the widow may require his personal representatives to redeem out of the assets of the estate, and she need not contribute; if there are not enough assets to pay the whole debt the personal representatives must pay as much as they can, and save the widow's dower as far as possible.

If the husband during his life has assigned the

equity of redemption, there are no decisions to the effect that the widow can require the assignee to redeem; still, if the assignee does redeem and the widow contributes her proportion, she has her dower. But if the assignee redeems during the husband's life, the widow has her dower without any contribution. The widow's share for contribution is the interest on one-third the amount paid for redemption during her life or the equivalent thereof.

The widow may herself redeem, but she must pay the whole debt, unless the mortgagee will accept a contribution and release her dower interest; this is important because if she does pay the whole it is doubtful whether she can require contributions from those holding under her husband.

If the mortgagee buys in the equity of redemption, or if the holder of the equity buys in the mortgage, though a merger is thereby created, as far as the widow and dower are concerned it is treated as a redemption.

If the husband, or anyone for him, pays off the mortgage, there is dower as if no mortgage ever existed.

If the mortgage is foreclosed during coverture the land is turned into personalty under a lien paramount to dower, and dower is gone. But some courts have held that, on account of her inchoate right, the wife must be a party to the foreclosure suit, and that if there is a surplus, dower therein will be set aside and kept for her. If the mortgage has been foreclosed after the husband's death, or the fund has not been distributed at the time, the widow has dower in the surplus, and if there is no surplus, dower is gone. Foreclosure destroys all the widow's rights in the property mortgaged, but the widow should be made a party to the suit.

As a general rule, every kind of lien for the

purchase money of land is superior to a wife's right of dower therein. If a vendor retains the legal title to the land as security, this is superior to dower; and so is his equitable lien superior, in places where such liens are recognized, though he has parted with the legal title; unless the vendor has taken other security, in which case the vendor's lien is, in the absence of express agreement, gone. So that, even if he obtains judgment against the purchaser for the purchase money, he thereby loses his equitable lien, and the judgment is secondary to the dower.

If the vendor takes a mortgage for the purchase money, it is almost universally admitted that such mortgage is superior to dower, though not signed by the wife. And if a third party lends a purchaser the purchase money and takes a mortgage therefor, he has the same right superior to dower that the vendor himself would have had if the mortgage had been taken by the vendor. It is essential that the payment of the purchase money and the giving of the mortgage should be part of one and the same transaction.

Whether the vendor reserves his lien or takes a mortgage, very nearly the same rights result, and the rules applicable to dower in mortgage property, the mortgage being superior to dower, apply. Thus, the wife has dower against all persons, except the mortgagor or vendor, or assigns. She may have dower till the claim of such parties is asserted. If the lien is discharged by payment, she has dower in the land. After her husband's death she may call upon his personal representatives to satisfy the lien, or have the other realty exhausted for this purpose. If the lien is enforced during her husband's life, her dower is gone; if after his death, she has dower in the surplus. In any case the purchaser takes the land free of dower. The vendor's lien is

on the land, not on the rents and profits. The husband may reconvey the land to the vendor in satisfaction of the lien, provided that this is not done to defeat the wife's rights.

Dower is a mere inchoate right from the time of the marriage, or of the vesting of the property if the property were acquired after the marriage, until the death of the husband at common law; or under statutes, until the time of divorce, the husband's bankruptcy, etc. It is a wife's right to such part of her husband's lands as the law at the time of his death, or of the alienation, if he has aliened it, may allow her. It is not a vested right, and the legislature may change it; it is a contingent right, and does not rise to the dignity of an estate.

But inchoate dower is a valuable right, and has many of the incidents of property. Though some cases say it has no present value, others say that its present value can be computed; it is a valuable consideration for a conveyance to a wife, and she may maintain an action for its protection, or file a bill for the redemption of a mortgage covering it; and in some states, she must be a party to any suit affecting it. Still it cannot be bargained and sold, but only released to the tenant; nor can it be taken in execution; nor can the statute of limitations apply to it.

Though it has at times been questioned whether inchoate dower is an incumbrance, that it is, is now settled; it comes within a covenant against incumbrances, and is such an incumbrance as would justify a vendee in refusing to carry out his contract.

At common law, on the husband's death and under statutes, on divorce, the husband's bankruptcy, etc., dower is consummate. It is not an estate, but a mere right of action growing out of land,

—the right to have dower assigned. The widow is not seised of the land in which she has such right; she cannot hold possession of such property, except by the law of quarantine. She has no right of entry as against the tenant; she cannot maintain ejectment, sue for trespass or proceed for partition; she cannot oppose the entry by the husband's heirs, and in many states she need not be made a party to a proceeding against the land. She cannot bargain and sell it at law; nor can it be seized in execution by her creditors; but she can transfer it in equity, and in equity it can be charged with her debts. She cannot mortgage or lease it, but she can release it to the tenant; and being sui juris, she can accept an award in its place. It is, however, an encumbrance, and an adverse claim against the land.

After assignment of dower and entry by the widow, she is seised of a freehold for her life, and her estate has generally the incidents of a conventional life estate. She may alien her estate, and it is liable for her debts; she may lease it, and the back rent belongs to her representatives in case of her death. She must pay the taxes and charges upon the property assigned to her for dower; she is entitled to reasonable estovers; she has a right to all crops growing on the property at the time of the assignment; her representatives are entitled after her death to all crops sown by her; on her death the estate ceases, and her representatives cannot claim betterments put on the property by her. She takes the property subject to all liens paramount to dower, but free from all others Her possession is not adverse to the reversioner. In various ways she may forfeit her estate, as by waste, in Delaware, Illinois, Kentucky, Maine, Minnesota, Missouri, New Jersey, New York, North Carolina, Ohio, and

Rhode Island; but the strict common law rule as to waste is not enforced in the United States, and the widow may make any reasonable use of the dower estate.

As has already been seen, even inchoate dower is an encumbrance or lien on the property subject thereto. As a lien or incumbrance it is inferior to all liens attaching prior to the marriage or to the acquisition of the property by the husband, and to all other liens attaching with the legally given consent of the wife; but it is superior to all liens attaching during coverture without such consent; except where statutes give the husband power to destroy dower by his sole act. As a general rule, if the property is sold under a superior lien during coverture, the realty is converted into personalty, and dower is lost; but if sold after the husband's death, dower is awarded out of the surplus. If a superior lien is satisfied, dower exists as if such superior lien never had been. Any sale under an inferior lien must be subject to dower.

A widow may have no right to dower either because the right never attached, or because after attaching it was destroyed; the right may be barred or defeated; a general glance over the various modes of barring and defeating dower, and a separate discussion of each will be helpful. Though it is extremely difficult to lay down any general rule which might not mislead, the following statement is substantially correct: The husband may avoid the inconvenience of dower by taking such a title in himself that the requisites of dower will not exist, or by changing his tenure before marriage for the same purpose; but this must not be done secretly, or it will be a fraud on the wife; so he may prevent dower by making a settlement before marriage, in accordance with the Statute of Uses or similar acts,

by legal jointure. After marriage and acquisition of his property, he can, in most states, do nothing to relieve it of dower without his wife's consent; but he can make a provision for her by deed or will in lieu of dower,—an equitable jointure,—by the acceptance of which after his death she will be barred of dower. The wife may prevent dower by covenanting before marriage never to claim it. During coverture she may release it by complying with the statute; and after her husband's death she may bar herself by any agreement she may make, or by accepting any provision in its stead, or by any conduct which would make it inequitable to claim it, or by her laches or delay. So dower may be defeated by operation of law, as when the husband's estate terminates or is converted into personalty by legal proceedings during coverture, or when the realty is taken during coverture, by right of eminent domain, or when the husband and wife are absolutely divorced.

By the common law, no provision or settlement made by a man before his marriage in favor of his future wife could bar dower, but the Statute of Uses gave this effect to a specified kind of settlement called a legal jointure. This statute was adopted in the United States as a part of the common law. Nor at common law could a woman be bound by any ante-nuptial agreement not to claim dower. And even now, except under the express provisions of some statute, no settlement or agreement between husband and wife is at law a bar to dower.

But in equity any provision in lieu of dower accepted by the widow is an equitable jointure and bars dower, and ante nuptial covenants of a woman not to claim dower have always been enforced.

Legal and equitable jointures are discussed further on in this chapter.

At common law any agreement between husband and wife was void and a married woman had no power to contract even in equity, except as to her equitable separate property; later, statutes gave a married woman, in some states, the capacity to contract as to her statutory separate property. But dower is a common law estate of a wife, and is not either equitable or statutory separate property; and the only way in which a wife can during coverture bar or defeat her dower is by complying strictly with statutes relating to the release of dower, discussed later, or by acting under the full capacity to contract accorded women by the statutes of a few states.

When the question arises as to the validity of a release to the husband under one of these statutes, which authorizes releases generally, it must be remembered that in dealing with her husband a wife is said to be under a double incapacity that of wife and that of married woman, and that it is fairly settled that, under a statute authorizing a married woman to contract generally, she cannot contract with her husband. Accordingly, it has been held that a release of dower under a statute directly to the husband is void. Even when the wife is authorized to contract, any agreement between them has been held to be void.

But, granting the capacity of a husband and wife to contract together, there is nothing in the nature of dower to prevent the enforcing in equity of an agreement of a wife otherwise valid not to claim dower.

And any provision made by a husband for his wife during coverture in lieu of dower puts her to an election to take it or dower. If, after the husband's

death, she accepts such a provision, she bars herself of dower; but if she has received the provision during his life and has spent or wasted it, she may take dower as if it had not been made; it is necessary in order to estop her that she should have enjoyed the provision, in part at least, after her husband's death. This question sometimes arises in cases of deeds of separation.

Any incumbrance placed upon a husband's property before his marriage may defeat dower to that extent and a husband may prevent dower from attaching by alienating his property, or by changing property which would be subject to dower into property which is not. The wife is barred, though the conveyance is not executed or recorded at the time of the marriage, though it is fraudulent as to creditors, if not set aside during coverture. The husband's simple agreement to convey is likewise paramount to dower. But a deed made or a judgment confessed on the day of the marriage is, unless proved to have been made or entered before the marriage, inferior to dower.

But a secret disposition of property by the husband or change in its form would be a fraud on the wife, and would not affect her dower; and so when dispositions during marriage defeat dower, a conveyance for this purpose alone would be a fraud of the husband on his wife and have no effect as to her.

As a general rule, however, no act of a husband during coverture, without the concurrence of the wife, can defeat dower. This was the rule at common law, and is still the rule in most of the United States. But now in England and in some states a husband may alone convey away his property without his wife's joinder in the deed, and thus defeat dower. Such statutes apply only to deeds

of a husband made after their passage; and a statute enabling a husband to defeat dower by conveyance during his life does not enable him to accomplish this by will.

Under such statutes as the English statute of 13 Edward I., ch. 34, a wife may defeat her dower by elopement and adultery; and other statutes may give this result to adultery alone; or to abandonment alone; or to other wrongful conduct; but as a general rule, a wife can defeat her dower by an act in the nature of a contract, only by pursuing some mode prescribed by some statute, unless her disabilities have been entirely removed. The statute of the particular state must be consulted on this point.

In all states where a husband cannot by his sole deed defeat dower, statutes provide for the release thereof by the wife. But statutes relating to married women's separate property have nothing to do with her dower rights.

The provisions of the statute relating to the release of dower must be strictly complied with; and a release not good at law is not good at all, and cannot be rectified in equity. The release need not be in any particular form, though in many states it must appear that the wife signs for the purpose of releasing her dower, while in others it is sufficient if she join in or execute the deed, which carries all her interest. Until the delivery of the deed she may revoke her release.

Unless the statute expressly authorizes her to release a loan, her husband must join in the deed with her; the husband must also join in release of dower in a former husband's estate; but the wife need not necessarily execute the deed at the same time with the husband, and where she must join with her husband, it is sufficient if she join with his

attorney in fact, or with his guardian or committee, if he be insane. But she must execute the release herself; she cannot release by power of attorney, and cannot, perhaps, even leave blanks to be filled up after the execution. An insane wife cannot release dower, nor can an infant wife; nor can a wife's guardian release dower for her.

Though a wife is empowered to release her dower by her sole deed it is doubtful whether she can release to her husband.

The grantee in the release cannot be a mere stranger but only someone who holds in some way under the husband; for the release operates by way of estoppel and an estoppel must be mutual; inchoate dower, it must be remembered, cannot be bargained and sold, but only released.

The question of consideration is not important; a wife may reserve a consideration to herself, but none is implied, and a consideration moving to her husband suffices.

The effect of a release of dower is in the nature of an estoppel, and not of a grant; and as an estoppel must be mutual, a stranger cannot avail himself of a release of dower; but it can be set up only by the husband's grantee or someone entitled to stand in his place. The wife is not estopped by her release from setting up a subsequent title in herself, or from alleging that it was obtained by fraud. The effect of the release is confined to the property actually referred to, and if a mistake is made in the description, she cannot be made to rectify it. Nor does her joining in a release of her dower have any effect on her own property; nor does her conveyance of property in a representative capacity affect her dower interest in the property conveyed. But if she convey in a representative capacity and her individual capacity also, her dower is gone. If the

release of dower, or the deed in which a wife joins to release dower, becomes inoperative, it does not affect her rights and she has dower as if it had never been executed.

Jointure, a settlement so called because usually made upon a husband and wife jointly during their joint lives, and after the husband's death on the wife, bars dower at common law under the statute of uses, and in equity under the doctrine of election. A legal jointure is such a provision as under the statute of uses or other statutes bars dower; an equitable jointure is such a provision as requires a widow to choose between it and dower.

To a strict legal jointure under the statutes of uses, which is in force in the United States as a part of the common law, so far as consistent with modern statutes, the following are the requisites:— (1) the provision must consist of an estate or interest in land; (2) it must take effect in possession or profit, immediately from the death of the husband; (3) it must be for the wife's life, at least; (4) it must be limited to the wife herself, and not in trust for her; (5) it must be made in satisfaction of her whole dower, and must be so expressed in the deed; (6) it must be a reasonable and competent provision for the wife's livelihood; (7) it must be made before marriage.

An equitable jointure is any other provision made for a wife, which puts her to an election, and will, if she accepts it, bar her of dower in equity, independently of statutes. The provision must be expressly in lieu of dower, or the same instrument must make a disposition of some part of the settlor's estate which is clearly inconsistent with the existence of dower therein, so that in claiming dower the widow would defeat, interrupt, or disappoint some provision in the instrument. The provision

may be made by deed or will. No technical language is necessary, but it is sometimes very difficult to determine whether the provision is in lieu of dower or not. Evidence outside the instrument is not admissable as to this point. In many states, however, the statutes require the widow to elect between any provision made for her by will, unless it is expressly stated not to be in lieu of dower.

If, when a wife is barred by legal jointure she conveys away jointly with her husband her jointure lands, she is nevertheless barred of her dower; but if the jointure be equitable only, such a conveyance is no election, and dower may be claimed. If she is evicted from either kind of jointure, she may be endowed of so much of the remainder of her husband's lands as may be necessary to make up her loss, provided that she does not get more altogether than she would have had if she had taken dower at first; and she may be so endowed against the husband's alienee.

The wife's estate in her jointure lands is not, like the dower after assignment, a continuance of the husband's estate; the wife takes as purchaser, and, for example, is not entitled to the crop sown at the time of the husband's death.

In certain cases a widow (a wife being under contractual disability cannot elect) may be required to elect or choose between her dower and some other provision. If a husband has exchanged some lands for others, his widow must elect to take her dower either in the new or the original lands, and cannot have dower in both. By the statute of uses, a jointure made during coverture puts a widow to an election; and all equitable jointures do this; as do devises in lieu of dower; and statutes in most states

require the widow to elect between her husband's will and her legal rights, including dower.

As to the manner and time of election, it is difficult in the absence of statutes, to lay down any definite rule. But if a particular mode of election is named no other will suffice. If the limited time for election has expired it is usually fatal, though in certain cases equity may extend the time. The election must be made by the widow in person; she cannot elect by attorney; nor if she is insane, nor an infant, unless the statute provides for such cases, can any one elect for her. But, if she elect while insane, she may ratify her act in a lucid interval; if she be an infant, equity will elect for her, or the time for election will be extended till her majority. But where, by statute, her guardian is authorized to elect, her election in person is void. If she die before electing her representatives cannot elect for her. If she marries before electing, it is doubtful whether her husband must join with her.

The effect of election is to make the widow a purchaser for valuable consideration of the provision taken in place of dower; and though in case, for example, of a devise, her rights are inferior to those of the husband's creditors, they are superior to those of other devisees,—though there is some difference of opinion on this point. And if she is evicted she may, generally, have her dower proportionately. If her election be to take dower, the provision made in lieu thereof is deemed a trust fund for those who are disappointed by her taking dower.

A widow's right to dower depends upon the law of the place where the land lies, and her election under a statute affects, in general, only the lands to which such statute applies—the lands within the state.

During coverture a wife cannot estop herself

from claiming dower, except by a release duly executed. But after her husband's death she is sui juris, and may lose her estate by estoppel just as any other person may.

Adverse possession of the husband of his lands during coverture cannot bar the wife's dower, as her interest becomes vested only on his death. And for various reasons, statutes of limitations have been held not to apply as against a widow's claim for dower, though in some states the statutes do so apply.

If a husband's lands are taken by right of eminent domain, dower is defeated, and a husband's voluntary dedication thereof to public uses has the same effect. If the right of eminent domain is in force during coverture, no allowance will, in general, be made for inchoate dower, but if the property is taken after the husband's death, dower will be allowed out of the damages.

Where a husband holds or has held a defeasible title, and it is defeated, as where he or his heirs are evicted by title paramount, or a determinable estate, and it is terminated as a base fee, the wife's dower also terminates, as her estate is but a continuation of her husband's; the possible exception to this rule being the case of an estate determinable on the conditional limitation or executory devise.

Under various circumstances, suits may be instituted for the sale of land in which a wife has dower. If the sale takes place under a right subsequent to dower, dower is not affected thereby; but if the sale takes place under a lien prior to dower, dower in the land is defeated, though the wife may have dower out of the net proceeds if the sale takes place after the husband's death.

Whether in such suits the effect upon dower

depends upon whether the wife or widow be a party to the suit, seems to depend rather upon local practice and local statutes than upon any settled principle. But it is permissible to make all persons interested in a piece of land parties to suits relating thereto; and as in some states dower would not be affected at all if the wife were not made a party, it is better always, when dower might attach, to make the wife a party.

A divorce a mensa et thoro does not bar dower, but a divorce a vinculo matrimonii, in the absence of statute, does, even though granted by a foreign court, if it be extra-territorially valid.

The husband's bankruptcy defeats dower only in cases where his voluntary assignment would have this effect, and usually the assignee in bankruptcy holds the bankrupt's lands subject to the wife's dower. It is not a part of the assignee's duty to try to save the wife's dower rights; he takes subject to those rights. In some states, on a husband's bankruptcy, the wife is allowed dower at once as if he were dead.

Upon the husband's death, as has been seen, dower becomes consummate, and is a vested right; but the widow has no right to enter upon her dower land, and no estate of dower until her dower has been assigned to her. She may remain in the family dwelling until dower is assigned; at common law the widow may remain in the family home or mansion of her husband for forty days after his death, and similar provisions exist in the statutes of most of the states—this is called her quarantine; and she has the right to have dower assigned as soon as practicable, the period being usually fixed by statutes.

The tenant of the freehold must assign dower, though by statute this duty has been placed upon

others, such as the husband's executor, or a tenant for years. And whoever is compellable by writ to assign dower, may assign it without writ, and vice versa.

The tenant assigning need not have a good title, his act being ministerial only; and the party with the true title will be bound if the assignment were of common right, and be bound until he avoids it, if the assignment were against common right.

Even though an infant, the tenant must assign, and a guardian may make the assignment. But in case of assignment compelled by writ, it is made by the sheriff or other officer of court.

The person who is bound to make the assignment of her dower to the widow, may do so without legal proceedings, under the common law; and an assignment so made, if fair and just, will be as valid as one made under a decree of court. He may either set off to her by metes and bounds one-third of the husband's lands and tenements, or one-third interest in his incorporeal hereditaments, thus giving her exactly what she is entitled to; and this is called an "assignment of common rights." Or he may, by an agreement with her, set off to her some portion of the husband's lands and hereditaments in lieu of what she is strictly entitled to; and this is denominated an "assignment against common rights."

The effect of the two kinds of assignment, of and against common rights, is not the same. If it be an assignment of common right, it is binding though made by a wrongful tenant; the widow holds the property clear of all incumbrances inferior to dower, and if it be taken from her under prior incumbrances, she may be endowed anew out of the balance of the estate. Whereas an assignment against common rights is not binding unless made by the rightful tenant, the lands are liable for the

husband's debts, and if she loses any part of them, she cannot be endowed anew.

The assignment may be made without writing, for the widow's right is not thereby created but only ascertained.

At common law the legal remedy to enforce the right to dower was by a writ of dower, under which judgment being obtained, dower is assigned by the sheriff, and then the widow may obtain possession by ejectment proceedings. The common law remedy is practically obsolete.

Under modern statutes the methods of assigning dower at law are so varied that discussion of them would be very unsatisfactory; the statutes themselves should be consulted, and in most cases will be found very plain and simple; if not clearly understood, however, of course, a lawyer should be consulted.

In equity, jurisdiction was first taken to assign dower in cases in which discovery was prayed; and then this jurisdiction was extended, principally because dower can be assigned by the same machinery which is used in partition suits and in settling accounts, until it became commonly concurrent with the jurisdiction of law.

When dower in equitable estates is to be awarded, equity has exclusive jurisdiction and courts of law are bound to respect an assignment of dower made by a court of equity.

When the widow sues for dower, all interested persons are proper parties, though the only necessary party is the tenant of the freehold. The bill should allege substantially the grounds of her right, and if there is no contest the court may proceed at once to make the assignment. If the widow's right is contested in equity, it is the practice of the court of equity to delay the case until the right is estab-

lished at law. All legal defenses are good, but no equitable defense is good against a legal title except that of laches.

The widow must prove her marriage, and the seisin and death of her husband.

Costs are in the discretion of the court. When there has been no denial of the widow's rights, she should pay the costs. But when the defendants have delayed her or disputed her rights, the costs should be borne by them.

Dower may be assigned out of the rents and profits, by metes and bounds, or out of money into which land has been changed.

As a general rule, whenever the property in which the widow is entitled to dower is capable of division, dower must be set off by metes and bounds. This was the rule at common law, but its application has proved so troublesome that such assignments are not common, and statutes have provided other means of giving a widow a fair third for her life. When an assignment by metes and bounds is about to be made, the tenant need not have notice. The officer who makes the assignment is a mere ministerial agent, and has no power except such as is given him by the writ, and he must strictly conform to the law. His return should report that he has made the assignment by metes and bounds, and should describe with reasonable certainty the property so assigned. If he fails or refuses to act, another may be appointed, and if he acts vexatiously he may be punished.

In making the division, quantity alone is not to be considered, but the value and productiveness of the land also. Whether improvements are to be considered is hereafter to be discussed. If there are several tracts of land the widow has a right to have her dower assigned out of each, but in some states

if all the tracts are held by the same parties an assignment for all may be made out of any one, and there are cases which hold that a husband's alienee may compel an assignment out of the tracts not aliened. Assignment may even be made of certain rooms in a house with the use of the halls, etc. But some property is not capable of division, and dower must be assigned as a part of the rents and profits, as hereafter shown. Dower may be assigned in estates in common by metes and bounds if such estates have been partitioned or the husband's interest assigned to his cotenant, but otherwise the assignment must be made of a part in common.

Whenever the property subject to dower is incorporeal, or is in its nature incapable of a fair division by metes and bounds, the widow may be allowed one-third of the actual or estimated profits or rents during her life.

So that, although a rent cannot be given in lieu of dower when the property is divisible, except by consent, when the property is not divisible, but its value consists of its rents and profits, as in the case of a tavern, a mill, a ferry or a mine, a rent may be given as dower, distrainable as of common right. If the property is not actually leased, it is very difficult to determine what its rents and profits are; the yearly interest on its market value is not always commensurate with its actual producing capacity. If the lands out of which a widow is dowable are sold under a paramount lien, and she is dowable out of the surplus only, dower is usually allowed either in a gross sum or in a life interest in one-third of it.

When dower is not assigned out of the lands themselves, or out of the actual rents and profits thereof, interest, as has been seen, is sometimes allowed on the estimated value of the proportion

which might have been assigned as dower, or the value of the widow's life interest may be calculated and given her at once in a gross sum. The power of the court to make an award in a gross sum has been questioned. When, however, the court has this power and desires to exercise it, it considers the chances of life in the widow, and the probable value of her interest, after such annuity tables as it chooses to follow.

When before assignment improvements are made, the widow is entitled to the benefit thereof if the husband died seised, but not if he had aliened the lands before his death. There seems to be little reason for the distinction, but it is nearly everywhere recognized.

As against the heir or devisee, it is well settled that the widow is entitled to dower as it stands when dower is assigned, including all improvements, except where statutes provide otherwise.

As against the husband's alienee, the same rule prevails in England; but generally in the United States improvements made after the husband has aliened the property are excluded in assigning dower, and either unimproved parts are assigned, or less is included in the assignment. The value of the property is therefore estimated as of the time of the alienation. The time of the alienation is determined by the date of the deed, if an absolute deed; by the date of the equity of redemption's passing from the husband in the case of a mortgage, for the widow has the right to improvements made by the husband after the execution of the mortgage but before foreclosure; and by the date of the bond of conveyance in accordance with which the deed was given, in the case of title following a bond of conveyance. The fact of improvements must be pleaded, but not in bar; and the value thereof may

be determined in accordance with the practice of the particular court.

Improvements are not generally held to include enhanced value due to the improvement of adjacent lands, or to the general prosperity, or to accretions, or to any extrinsic cause; nor do they include mere repairs. But everything added by the money or skill of the alienee is an improvement within the meaning of this discussion; not only buildings erected, fences made, etc., but platting the land and preparing it for a depot, for instance, and crops sown are improvements. And in some states increase in value from whatever cause is regarded as an improvement to be allowed for in awarding dower.

Depreciation in value of property subject to dower raises questions, just as improvement therein does. If the property has diminished in value before assignment, as against the heir or devisee, dower is assigned according to the value of the property at the time of the assignment, and if the heir or devisee has been guilty of waste he is liable in damages. But if the improvements have burned down and the heir or devisee has received the insurance money, the widow is entitled to her dower therein. As against the alienee, the value of the land is taken as at the time of the assignment so far as diminution has been due to natural causes, or to waste before the husband's death, but the widow must be allowed for waste after her husband's death. In New York, however, dower is assigned according to the value of the property at the time of the alienation.

At common law, no matter how much time elapses before the assignment of dower, the widow could not recover damages for its detention; but by the statute of Merton, which has been held in force

in the United States, she is entitled to the whole value of her dower from the husband's death to the time of the assignment; and similar statutes are in force in several states. But as the usual procedure for dower is now in equity, the right to claim an account has almost taken the place of the right to damages.

Equity, as has been seen, has full jurisdiction over the assignment of dower and may assign mesne profits, i. e. her share of the rents and profits between the time of the husband's death and the time of assignment,—even when dower has been assigned at law, and this independently of the statute of Merton or any other statute, and as against the husband's alienee as well as against his heir or devisee. But as against the husband's alienee mesne profits are calculated only from the time of demand for an assignment, whereas, as against the heir or devisee no demand is necessary. If the tenant die pending the suit, this does not affect the widow's right to mesne profits; nor does her death pending suit prevent her representatives from recovering the same; but whether her representatives can recover if she has died without instituting suit, has been disputed. A release of dower includes mesne profits, and a widow will not be allowed to recover mesne profits if she has meanwhile occupied the land, or has been compensated for the delay in the assignment of dower.

The mesne profits are the actual profits from the date of the husband's death or the time of demand, as the case may be, to the time of assignment, —a part of the rent if the property has been leased, a share of the crop, if a crop has been raised, or, if dower has been assigned in money, interest on the amount.

The assignment of dower gives the widow an

estate, the incidents of which have already been discussed.

If dower has been assigned without suit, fairly and of common right, it satisfies and bars dower; but if the assignment be against common right, it will not avail as a defence to any party not privy to the agreement. When assigned by suit, the lands not assigned are freed; but as the widow has a right to a new assignment if the title to the assigned lands fails, it is necessary that one who takes title in lands out of which dower has been assigned should be sure that the widow's title to the lands assigned to her is good. In an assignment, however, the widow may have received either too much or too little.

In the case of an excessive assignment, if the assignment has been made by an adult without suit, he can have no relief; but an infant may have a writ of admeasurement of dower in such a case. If the excessive assignment has been made in a suit by the officer of the court, the tenant may by scire facias have an assignment de novo, or may perhaps have the assignment set aside in equity; or he may recover in ejectment, lands out of which the judgment gave no right of dower. But if the widow is deprived of lands once assigned to her as dower, she must be allowed for the improvements made by her in the meantime.

In case of the failure of the assignment in whole or in part, if the widow is evicted after assignment and thus loses her dower in whole or part, if the assignment were of common right and she had received only her apparent legal rights, she may proceed for a new assignment out of the remainder of the lands subject to dower, as if no assignment had been made. But it seems that at common law this rule did not apply as against the husband's alienee. If the assignment were against common

right and she has agreed to take the lands assigned in lieu of the actual lands she was entitled to, she had no remedy if evicted.

CHAPTER X.

CURTESY

Curtesy is the estate to which by common law a man is entitled, on the death of his wife, in the lands or tenements of which she was seised in possession, in fee simple or in tail during their coverture, provided they have had lawful issue born alive which might have been capable of inheriting the estate. It is an estate for life created by the law. When a man marries a woman, seised, at any time during the coverture, of an estate of inheritance, in severalty, in coparcenary or in common, and hath issue by her born alive, and which might by possibility inherit the same estate as heir to the wife, and the wife dies in the lifetime of the husband, he holds the land during his life by curtesy.

That he may be entitled to a tenancy by the curtesy, four requisites must exist; viz., there must be a legal marriage; there must seisin by the wife during coverture; there must be issue capable of inheriting the estate; the wife must be dead. Where an illegitimate child under a statute becomes legitimate by the subsequent marriage of the parents, the father will be entitled to an estate by curtesy, at the death of the mother, although no other issue was born.

The marriage must be a lawful one; though if it be a voidable one, it will give curtesy, unless it is actually avoided during the life of the wife. It cannot be declared void afterwards.

To entitle a husband to an estate by the cur-

tesy in the real property of his wife, she must have been seised of it during coverture; but it is not necessary that she should be seised of it at the time of her death, or at the time of birth of issue. A female of full age, owning land, sold it by verbal contract, received the price, put the purchaser in possession, but failed to convey until she became a feme covert and had issue born alive, when her husband united with her in a conveyance to the purchaser. It was held that the husband was not tenant by the curtesy. But if, on the eve of her marriage, a woman should convey her real estate without the consent of the contemplated husband, it is a fraud on his rights and void as to him.

Although it is undoubtedly the general language of the English authorities that only seisin in fact during coverture entitles the husband to an estate by curtesy, this rule, in its literal strictness, has not been adhered to, either in England or in this country. In order to give a right by the curtesy in the wife's lands, it is not sufficient that the wife was seised of an estate of inheritance therein during coverture; she must also have the right to the present possession of the freehold.

Without birth of issue, no estate by the curtesy can exist; the child must be born alive; but, even where it dies immediately after birth, the right of curtesy attaches. The child must have been born during the life of the mother. The birth of a child after the mother's death by the Caesarean operation, though it be born alive, is not sufficient to confer the right. It must have been such a child as by possibility might have inherited the estate.

Where a wife died intestate, leaving children by a former husband, it was held that the surviving husband was entitled to an estate as tenant by the curtesy, in so much of her real estate as would by

law descend to her children of the second marriage. A father left to his three children each a lot of land in fee, and added "if either of these three—M, J and L—should die without lawful heirs of their body, the estate shall fall to the other two; if two should die, their estate shall fall to the one; if the one should die without heirs, the estate shall be equally divided between C's and A's heirs." Two of the children died unmarried, before the father. The other one died afterward, but left no issue, although she had one child born alive. It was held that her husband had an estate by the curtesy in the three lots.

A wife's declarations, made shortly after the birth of a child, that it had been born alive, are not competent evidence to establish her husband's title to an estate by the curtesy.

In Pennsylvania by statute, the birth of issue is no longer required. The right of estate by the curtesy is not complete before the death of the wife, although it exists after marriage, the birth of issue and seisin. It is then "initiate" and contingent on the death of the wife. A tenancy by the curtesy initiate is both salable and assignable. The interest of the husband is a legal estate; it is a freehold during the lives of himself and wife, with a freehold in the remainder to himself for life, as a tenant by the curtesy and a remainder to the wife and his heirs, in fee. It is a certain and determinate interest, whose value may be ascertained by reference to well known rules. It is in every sense his land and liable to respond for his debts. The right of curtesy initiate is not a vested right; and as curtesy consummate is regarded as an estate by descent, and rules of descent are determined by the law as existing at the time of the ancestor's death, it follows that, during the lifetime of the wife curtesy initiate

may be destroyed by the statute. But if the statute does not expressly refer to existing rights, it will be applied only to those that arise after its passage.

After the death of the wife, curtesy initiate becomes curtesy consummate. The estate is then vested. It vests by operation of law and without assignment.

The right of tenancy by the curtesy can exist only in real estate. When, however, money is treated in equity as real estate, the husband may have the interest thereof as curtesy.

The right to a tenancy by a curtesy is not confined to legal estates. A husband is entitled to curtesy in equitable estates of inheritance of the wife in possession.

It has been held that the husband cannot be tenant by the curtesy of the separate real estate of the wife.

But the better opinion seems to be, that, all the requisites concurring, the husband may be tenant by the curtesy of his wife's separate real estate notwithstanding he is cut off from any participation in the rents and profits during coverture. But if the purpose to cut him off from the curtesy be clearly expressed in the instrument of settlement, then his right is gone, although formerly this could not be done at law.

By agreement with his wife a husband may relinquish his right to a tenancy by the curtesy; and such an agreement may be made before or after marriage.

The right of curtesy is expressly abolished by statute in some states, in others retained as it was at common law, in others not mentioned in the statutes, while in others the common law rights are greatly modified. Where the right of curtesy is expressly abolished, the statute generally makes an-

other provision for the husband, as where the husband has a right of dower in his wife's estate, the same as the wife has in his estate. It has been held that the acts relative to the protection of the rights of married women entirely abrogate the existence of prospective tenancy by the curtesy. Every quality and incident that is necessary to constitute such a tenancy is destroyed by the provisions of these acts.

Now, however, the law seems to be substantially settled, that, while those acts excluded the husband during his life from control of, or interference with, his wife's real and personal estate, and gave to her alone the power of distribution by deed or will, yet they left the husband the right of curtesy in her real property in so much as remained, at her death, undisposed of and unbequeathed.

CHAPTER XI.

SEPARATION BY AGREEMENT

By separation of husband and wife is meant their voluntary marital dissassociation; a secession of co-habitation by mutual consent; only colloquially is the word to be applied to a mere casual temporary absence. It is also widely distinguishable from abandonment or desertion, although sometimes the agreement results therefrom. It is also clearly distinguishable from divorce a mensa, although involving sufficient principles in common therewith to be considered cognate thereto.

Separation deeds are mutual deeds of arrangement between husband and wife, generally executed for the purpose of avoiding unpleasant exposures of marital infelicities, and of more effectually providing for consequent altered circumstances of wife and off-spring, and for a just mutual disposition of property rights.

In England, such deeds, in the form of articles of separation, were once held to be contra bonos mores, and courts of equity refused to carry them into effect. But judicial opinion has undergone a change, and it is now well settled in England that such deeds are not against public policy. It is impossible to say what the opinion of a man or judge might be as to what public policy is. For a great number of years, both ecclesiastical judges and lay judges thought it was something very horrible, and against public policy that the husband and wife should agree to live separate, and it was supposed

that a civilized country could no longer exist if such agreements were enforced by courts of law, whether ecclesiastical or not. But a change came over judicial opinion as to public policy; other considerations arose and people began to think, that, after all, it might be better and more beneficial for married people to avoid in many cases the expense and scandal of suits of divorce by settling their differences quietly by the aid of friends out of court, although the consequence might be that they would live separately, and that was the view carried out by the court when it became once decided that separation deeds, per se, were not against public policy. Thus is presented the anomaly that while separations in pais or in court are not to be sanctioned except on proof of a dereliction legally defined and declared sufficient, never on the consent of the parties, nevertheless, as the wife may bring, defend, and settle divorces she may make an agreement whereby suit is avoided.

It has also been held in some of the United States that articles of separation between husband and wife, whether entered into before or after the separation, are against law and public policy, and therefore void. But in almost all the states, such deed is good as to provisions for maintenance, but not as a bar to cohabitation.

In some of the states, statutes inhibit any change of marital rights and obligations other than by judicial act. The effect of separation articles, especially as to third persons, often turns upon the extent to which the legislature has enabled the wife to contract. The statutory provisions, therefore, as also those for voluntary separation, are very diverse.

In Alabama upon voluntary separation the court of chancery may, on petition of one party,

and twenty days notice to the other, permit the father or the mother to have the custody and control of the children, and to superintend and direct their education, having regard to the prudence, ability and fitness of the parents, and the age and sex of the children. Her voluntary abandonment of him against his consent is not a voluntary separation. The assent of both may be implied, though not expressed. His wish for her to go may be indicated by cruel treatment.

In Arizona, no matrimonial agreement may be altered after the solemnization of marriage.

In California, a husband is not liable for the support of his wife when she is living apart from him by agreement, unless such support is stipulated in the agreement. The mutual consent is a sufficient consideration for the agreement to separate.

In Colorado, as in other states, procurement by fraud will invalidate the agreement.

In the Dakotas, the husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree in writing to an immediate separation, and may make provision for the support of either of them and for their children during such separation. The mutual covenants constitute a sufficient consideration for the deed.

In Georgia, the contracts of a married woman are generally void as we have seen.

In Illinois, the wife cannot abandon her husband without his consent, to acquire separate income. Equity will compel him to pay promissory notes given upon a separation to secure her support, but fraudulently gotten possession of by him. Her agreement to return and cohabit will support his agreement to pay money to a trustee for her use.

In Indiana, the wife of an absentee has all the

rights of a feme sole; and a parol agreement for separation without intervention of any trustee has been sustained in that state.

In Iowa, a separation deed will be sustained as to the maintenance and mutual disposition of property rights.

In Kansas, husband and wife may contract with each other so as to pass title.

In Kentucky, a contract for separation with no trustee will not be enforced; but one's contract to support his wife, made in view of an immediate separation, is valid; otherwise, if of one not immediately to take place. A recital in a separation deed that she had abandoned him "without legal cause for dower or alimony" was held ground to refuse dower after his death.

In Maine, a married woman may release to her husband the right to control her property. And a divorced wife may recover on a note executed to her by her husband during coverture.

In Maryland, only by causes that show an absolute impossibility to discharge the marriage duties can separation be justified. A wife living separate from her husband, unjustifiably and without his consent, cannot be allowed maintenance out of her inherited legal estate. In case of a separation deed not providing for an indemnity against the wife's debts, the court will not compel the husband to aid in giving title to land she has assumed to convey. A separation deed signed by the wife's attorney and not by herself, was held invalid by the laws of that state. A separation deed with trustee, for support, protects the husband against a claim, even for necessaries furnished the wife by a third party.

In Massachusetts, a bond between husband and wife is not void as against public policy. Deeds wherein the husband, in contemplation of imme-

diate separation, agrees to pay a trustee money for the wife's support, are not against public policy. Payment of arrears thereunder may be enforced after her death. The title to a note handed to her on separation, has been held by the laws of that state to remain in him.

In Minnesota, except as to real estate, she may contract with her husband as if sole; and they shall be held to have notice of each other's contracts and debts, wherever rights of creditors come in question. She may alone release dower in lands of a former husband.

In Mississippi, the common law, as to the disabilities of married women, and its effect on the rights of property of the wife, is totally abrogated; and, happily, husband and wife may sue each other in Mississippi. A separation deed is void without, but valid with a trustee, but there must be mutual intent to separate.

In Montana (this is worthy of note) a married woman may make contracts oral or written, sealed or unsealed, and may waive or relinquish any rights or interest in real estate, either by person or by attorney, in the same manner, to the same extent, and with the like effect as may a married man.

In Nebraska, a married woman will not be bound by any covenant in a joint deed of herself and husband and the wife may recover on a note executed to her by her husband during coverture.

In Nevada, a husband and wife may agree to immediate separation, and may make provision for the support of either of them and of their children during such separation. The mutual consent is a sufficient consideration therefor.

In New Hampshire, the wife of an alien may, after six months' residence, hold and convey real property, as if sole, and have exclusive custody of

her minor children living with her. Under the statute of 1860 giving the wife control of her separate property she may, it seems, contract with her husband in relation thereto. A note and mortgage executed by the husband with a view to divorce was held void by the laws of that state.

In New Jersey, a wife may contract as if sole, except as accommodation endorsor, guarantor or surety. A deed not signed by the trustee, was held not operative except as an agreement to live separate. The husband's conveyance to a trustee for the use of his wife on executing articles of separation, will not be set aside for her subsequent adultery while living apart.

In New York, a married woman may contract as if unmarried except with her husband. In certain cases, such as cruelty, conduct rendering cohabitation unsafe and improper, abandonment, and neglect to provide for the wife, an action may be maintained for separation from bed and board, forever, or for a limited time.

In North Carolina, a woman living apart under a registered deed of separation, may be a free trader. No contract between husband and wife made during coverture will be held valid to affect or change any part of the real estate of the wife, or the accruing income thereof, for a longer time than three years. Contracts between husband and wife, not forbidden by the preceding requirement and not inconsistent with public policy are valid. A voluntary separation under some circumstances, is recognized as a legal condition, out of which may arise certain powers to be exercised over her estate.

In Ohio, a husband or wife may enter into any engagement or transaction with the other, or with any other person, which either might if unmarried; subject, in transactions between themselves, to the

general rules which control the actions of persons occupying confidential relations with each other. A husband and wife cannot by any contract with each other alter their legal relations, except that they may agree to any immediate separation, and may make provision for the support of themselves and their children during the separation. Articles executed with a trustee for separation and the wife's maintenance are not against public policy. A post-nuptial agreement, appropriating property to her separate use, though void at common law, will be sustained in equity.

In Oklahoma, the same provision for a separation agreement has been made as in Nevada.

In Oregon, a conveyance by a husband or wife to the other is valid and they may contract with each other.

In Pennsylvania, as early as 1846, the doctrine was well settled that separation deeds were valid and effectual, both at law and in equity, provided their object be actual and immediate and not a contingent or future separation.

In Rhode Island, in the absence of express provision to the contrary, a separation deed is no bar to a divorce.

In South Carolina, a bond to a trustee, reciting an agreement to live separate, and conditioned to pay an annual sum for the use of the wife, is valid; and it may be shown by parol evidence that a separation had previously taken place, and that the bond was given to compromise a suit for alimony.

In Tennessee, married women over the age of twenty-one years, owning the fee or other legal or equitable interest or estate in real estate, who have abandoned their husbands, or whose husbands may be non compos mentis, or whose husbands may fail or refuse to cohabit with or have abandoned them,

shall have the same powers of disposition by will, deed, or otherwise as are possessed by unmarried women. The husband's concurrence therein is not necessary; and he may be estopped by a separation bond from claiming any portion of the wife's estate.

In Texas, the wife may contract debts for necessaries furnished herself or children, and for all expenses which may have been incurred by the wife for the benefit of her separate property. For such debts the husband and wife must be sued jointly.

In Utah, the separate property of each spouse, may be held, managed, controlled, transferred, and in any manner disposed of by the spouse so owning or acquiring it without any limitation or restriction by reason of marriage.

By the Edmunds-Tucker law of 1887, dissolving the incorporation of the Mormom Church, a widow is endowed of a third part of all lands whereof her husband was seised of an estate of inheritance at any time during the marriage.

In Vermont, an agreement of separation, signed by the husband and the wife's father, as her agent, was held to be a good defence to her petition for a divorce for acts of cruelty occurring before the agreement.

In Virginia, a married woman may contract as if sole in respect to her trade, services or separate estate. A separation deed executed under apprehension of a suit for divorce for the wife's adultery was held invalid.

In Washington, the earnings and accumulations of the wife and of her minor children living with her, or in her custody while she is living separate from her husband, are the separate property of the wife.

In West Virginia, a wife may control her separate property, but not dispose of her real estate

without her husband's consent, unless she be living apart from him or he be non compos mentis. If by an ante-nuptial agreement or otherwise he has acquired any of her separate property, he is liable for her ante-nuptial debts contracted for its value.

In Wisconsin, the wife's separate property and earnings are not subject to her husband's control. A mutual agreement for each to release all interest in the property of the other (not in view of separation) is void.

An act enabling a married woman to contract as if sole as to her separate property, may, in the absence of a contrary provision, apply to articles entered into with her husband; such statute must be liberally construed.

No particular form is prescribed for the deed of separation either by statute or usage; and a mere parol agreement for separation may be valid.

It must be evident from what has been said above, and from the principle of the matter, that the rights of the public are not to be ignored in a voluntary marital separation; wherefore, it follows that a bargain for a future separation is invalid, while a separation having once taken place a provision looking to the wife's maintenance is valid and proper.

As between the parties, the husband's duty to support his wife is a sufficient consideration for his promise to pay her an allowance. She must have some valuable consideration for the release of her rights. There must also be some valuable consideration against existing creditors, as, for instance, a third party's promise to indemnify him against her debts. Mutual consent may be, perhaps of itself alone, a sufficient consideration for the contract; certainly, if so declared by statute. Conciliation and the family's highest interests are deemed as weighty as any mere pecuniary consideration. The

trustee's indemnifying the husband against the wife's future debts is a valuable consideration, and takes the conveyance out of the statute of fraudulent conveyances.

Formerly it was deemed absolutely necessary that the property of which the wife was to have exclusive use be vested in trustees for her benefit; and that the husband's agreement should be made with such trustees, or at least with somebody capable of contracting with him for her benefit. This is still customary and proper, but not indispensable.

Ordinarily, the law gives the father the custody of the children. The courts, however, look to the child's welfare as paramount, and award the custody to that parent who is most proper, fit and able to promote the same. If not prejudicial to this, any family arrangement in the deed of separation as to custody, visits, and other incidental matters, will be sustained. Under the present English law, a provision as to children is construed wholly with regard to their welfare. In the deed of a medical officer of the British Army, having four children, the eldest eleven and the youngest three years old, he stipulated that after his approaching absence in India, he should resume their entire custody, the wife to be accorded full and free access to them, to the extent, at least of her having the opportunity of spending one day in every fortnight with them. Four years afterwards he was ordered to Egypt and proposed to take the first child, a daughter, and the third one, a son, with him. On her application for an injunction—it was held, that the deed did not preclude him from taking them, there being no proof that his purpose was to prevent her from having access to them.

The ordinary grounds for avoiding a contract apply to a separation deed; e. g., procurement by

fraud or undue stress, except, sometimes, in case of infancy and coverture. Resumption of cohabitation, restoring the former relations, will also avoid the deed. A casual intercourse of three days however has been held not to be proof of permanent reconciliation; and a mere cessation of sexual intercourse is not such separation as will sustain the deed. Mere communication by letters may not import recohabitation. And an agreement for separation has been held not to be suspended during reconciliation.

The fact that before the marriage the wife had illicit intercourse with another than the husband, and induced him to execute the deed in contemplation of a renewal thereof, would be grounds for its avoidance.

The husband's conveyance to a trustee for the wife's use, made on execution of separation articles, will not be set aside for her subsequent adultery while living apart. Adultery may be a ground for forfeiture of dower but not of a jointure. A deed executed under the wife's apprehension of a husband's suit for divorce on the ground of her adultery, and wherein she conveyed to a trustee $12,000 worth of real estate, for him and the two children, he to deliver to the trustee annually certain provision for her support—was held invalid. In England, it has been held, that a deed made between husband and wife and a trustee with a covenant by the husband to pay the trustee an annuity, in case she live apart from him, is void, as contemplating a future separation at her pleasure, and therefore against marriage policy. Where a deed stipulated that the husband should not visit the wife without her consent, his visit to her with her consent, and passing one night in her bed-chamber, was, in absence of

any other evidence of reconciliation, held not to avoid the deed.

If the consideration be apparent, the arrangement fair, and the trustees' duties clearly defined, equity will enforce a deed made in continuation of a separation, or in contemplation of an immediate separation; and sometimes, a post-nuptial contract containing stipulations void as to law.

At common law a married woman could not contract and sue and be sued as a feme sole, even though living apart from her husband and having a separate maintenance secured to her by deed. But this rule has been largely modified by statute. In England it has been held that the general reputation of separation and allowance for support is sufficient to protect the husband against a claim for necessaries furnished the wife.

A deed of separation is generally no bar to a suit for divorce; though in England, articles of separation were, in the House of Lords, held to form an insuperable bar to the special interposition of the legislature on an application for a divorce.

By the common law of England, and of many of the states, and by the statutes of some of the states, he who has abandoned his wife without provision for her support is presumed to have waived his right to her acquisitions as a sole trader, and she may sue and be sued, contract and convey, as a feme sole; in many instances, however, an ordinary protracted absence being distinguished from that of his imprisonment, exile, or other civil death. The subject can be comprehended only by an historical and comparative view. In England the law was declared in a case, the total report whereof is as follows: "An ordinary working-man married a woman of like condition; after cohabitation for some time he left, and during his absence she

worked; and this action being brought for her diet, the money she earned should go to keep her." In Massachusetts in 1818, it was held that a feme covert, whose husband had deserted her in a foreign country and who had thenceforth maintained herself a feme sole, and for five years had lived in Massachusetts (he never being in the United States), was competent to sue and be sued as a feme sole, and her release was a valid discharge of a judgment recovered by her. This decision has been quoted with approval by the United States Supreme Court. In Massachusetts, it was early held that a wife whose husband is an alien or nonresident is restored to her capacity to contract as a feme sole.

After their voluntary separation, they may for some purposes, be witnesses for or against each other.

His living apart from her has, under certain circumstances, been held to deprive him of remedy for her misconduct. Where a suspecting husband took a lodging for his wife, it was held that he could not maintain an action for criminal conversation committed by her while he remained away.

The conjugal relation imposes upon the husband the duty to support the wife. If he has provided therefor by deed or otherwise, and is fulfilling the provision, she cannot pledge his credit therefor; otherwise, if he fails to fulfill the stipulation or to pay the alimony in a decree a mensa. In general, upon their voluntary separation without sufficient provision for her maintenance, he is liable for medical attendance or other necessaries furnished her by third parties. This general rule applies in many instances of separation not mutually voluntary. In a case where he unjustifiably absented himself, he was held liable for debts mean-

while incurred by her in keeping a boarding-house for her support. The decision as to requisites, for recovery in a suit against him upon debts incurred by her for support while apart, are not uniform. As to suits for necessaries furnished during cohabitation, see chapter on Husband and Wife. In England, one who furnishes support to an unjustly deserted wife has a remedy in equity against the husband. While the presumption of her agency continues, the burden of proof is on the husband to show that he had supplied her sufficient maintenance according to their condition in life. It was held in Massachusetts that he was not chargeable with other supplies furnished her where, on separation by mutual consent, the husband paid the wife three hundred dollars, she agreeing to make no claim to support, and to release her dower right in his land, and she made no such claim nor any offer to return. Where, on such separation, he contracted with her father for her maintenance, but she afterwards left her father without any good cause, it was held in New Hampshire that she could not pledge her husband's credit.

This presumption of agency does not extend to authorize her to borrow money to pay out for necessaries. His assent to the furnishing will be presumed, upon proof that he knew thereof and made no objection. Whether upon separation with a sufficient allowance, which the husband continues to meet, or upon adequate provisions from any other source, he must give express notice thereof in order to exempt himself from liability to tradesmen assuming to deal with her, the decisions have not been uniform. In Missouri, he has been held liable, upon failure to so notify creditors. In Georgia, by statute, notice relieves him if she abandons him without sufficient provocation; but not if for his misconduct. In Michigan, in a proceeding

at law to recover against the husband's estate for the wife's support, the sufficiency of the alimony allowed in chancery cannot be reviewed by the jury. In New York, the report of a referee, fixing alimony, if not confirmed, is no defence to a suit for necessaries. He has sometimes been held liable notwithstanding his express prohibition. In the leading English case, thereon, the majority of the court held that the husband could not be held against his express prohibition. In general, upon a separation, a party furnishing the wife with necessaries, accepts at his peril her pledge of the husband's credit; and must show the existence of justifiable cause, especially if, at the time thereof, he was aware of her intent of desertion. If the wife has justifiably withdrawn and dies, the husband is liable for her funeral expenses. In general, he is also liable for proper expenses in legal proceedings, if incurred by her because of his misconduct. So also does the general rule of the husband's liability for necessaries apply where his wrong doing compels the separation. Where a husband placed a dissolute woman at the head of his table, and confined his wife on a charge of insanity, but she escaped, it was held that he, not verbally forbidding her return, was not liable for necessaries furnished her. This decision has been severely animadverted upon in England. The court said: "If a man renders his house unfit for a modest woman to remain in it, she is authorized in going away." The decision has also been disapproved in America in a case involving precisely the same circumstances. The husband is also liable for necessaries if she, although voluntarily and unjustifiably leaving him, has returned, or made a bona fide offer to return.

One seeking to charge the husband for necessaries furnished must make out a case negativing

captious abandonment. As to what constitutes desertion or abandonment see chapter on Divorce. In Pennsylvania, her withdrawal through wrongful representation by his relatives that she intended to put him in an insane asylum, was held not to be desertion. In West Virginia, a charge of prostitution made by the husband against the wife falsely, is deemed cruel treatment and, perhaps, abandonment. In Louisiana, where a wife's incessant demands for money, scorn and personal violence were met by the husband with what the court termed "unresisting imbecility" until he abandoned the dwelling, she was held not to be entitled to a decree for separation.

Her bigamy, if committed through his fault, has been held not to exempt him from liability for her support. So also as to her adultery committed through his connivance. In New Hampshire, it has been held that his duty to support her is not terminated by her adultery committed with his written consent given on condition that she shall not look to him for support. Proof that the wife, at the time of furnishing her with the necessaries, was living in open adultery, constitutes a valid defence to the suit against the husband therefor. So also if the plaintiff knew at the time that the husband had discarded her for her adultery. It has even been held that where the wife eloped with an adulterer, the husband was not liable, although the tradesmen had no notice of the fact. Separation by insanity of either does not change the general rule as to their rights and liabilities meanwhile. The husband's liability, upon separation, for the support of a pauper wife is not the same in all the states; owing ordinarily to the difference in their poor laws. In New York, the wife of a husband able to support her is not a "pauper" within the statute; and

although he unjustifiably turns her out, the superintendents of the poor cannot recover of him for necessaries furnished her. In Massachusetts the law is otherwise. In Vermont he is liable for not over one year's support. In Ohio the husband is not liable for expenses of a treatment for his insane wife in the state hospital. In West Virginia, otherwise.

In many states, a statutory provision is made for compulsory support of the wife by a husband unjustifiably abandoning her. The Massachusetts statute affords a good illustration. "When a husband fails, without just cause, to furnish suitable support for the wife, or has deserted her, or when the wife, for justifiable cause, is actually living apart from her husband, the probate court may, by its order on the petition of the wife, or, if she is insane, on the petition of her guardian or next friend, prohibit the husband from imposing any restraint on her personal liberty for such time as the court shall in such order direct, or until the further order of the court thereon; and the court may, upon the application of the husband or wife or of her guardian, make such further order as it deems expedient concerning the support of the wife, and the care, custody, and maintenance of the minor children of the parties, and may determine with which of the parents, the children or any of them shall remain; and may, from time to time, afterwards, on a similar application, revise and alter such order, or make a new order or decree, as the circumstances of the parents or the benefit of the children may require."

This statute is constitutional, although it makes no provision for trial by jury. The husband, though under guardianship as a spendthrift, may be prohibited from restraining the wife's liberty. The probate court cannot, without consent, order payment

of a sum in gross for all the future support of the wife. The fact that the husband has deserted his wife and gone into another state, does not preclude the statutory award for separate maintenance. The petition may be granted, although the living apart was only for a day. The fact that she has executed a release of all claim for support, and that the consideration has been received by her, is no bar to her petition. Where an attachment has been ordered for separate maintenance, successive executions may be issued thereon.

Massachusetts also affords a good representative of statutes declaring such abandonment a criminal offence: "whoever unreasonably neglects to provide for the support of his wife or minor child shall be punished by fine not exceeding twenty dollars, or imprisoned in the house of correction not exceeding six months;" the fine, at the discretion of the court, to go to the town, city, society or person actually furnishing the support. In a prosecution thereunder, the complainant, to rebut the husband's charge that she had failed in her marital duty, was permitted to adduce a decree of the probate court for her separate maintenance, also a decree dismissing his libel for divorce.

In England, a wife wrongfully deserted by her husband, may have an order for protection of her property; and upon judicial separation, have the rights of a feme sole.

The husband is not bound to maintain his wife's children by a former husband unless he has taken them into the family.

In Connecticut, any husband neglecting, without good cause, to support his wife, may be sentenced to hard labor for not more than sixty days, or compelled to give bond. Upon a prosecu-

tion for failure to support, her adultery is a sufficient defence.

In Delaware, a husband deserting his wife, without making proper provision for her support, is liable to have his property sequestered by the board of trustees of the poor.

In Florida, in case of his cruelty or desertion, the court will intercept her estate in his hands, or remove him as trustee.

In Georgia, if any man shall whip, beat, or otherwise cruelly maltreat his wife, he shall be deemed guilty of a misdemeanor, and the wife shall be a competent witness against him. The statute, rendering him liable for her support, is like that of California. She may, without applying for a divorce, maintain an action against him for intolerable cruelty.

In Indiana, the wife by an ordinary suit against the husband, may obtain support when he has deserted her without cause and without provision, or has been convicted of a felony and imprisoned, or is an habitual drunkard, or refuses to live with her in the conjugal relation, by joining himself to a sect, the rules of which require such renunciation.

The Indiana act for relief of a "deserted" wife, does not apply to a deserting one. An omission in the complaint to allege that his deserting her was without cause, is cured by verdict. His unjustifiably deserting her is punishable by fine.

In Iowa, on abandonment by either and absence from the state for one year, without provision, or imprisonment for a year or more, the abandoned spouse may, by ordinary action in the district or circuit court, become authorized to manage, control, sell and encumber the property of the husband or wife, for the support of the family, and for the purpose of paying debts.

In Kansas, the wife may obtain alimony from the husband without a divorce, in an action brought for that purpose in the district court, for any of the causes for which a divorce may be granted.

In Kentucky, where the husband abandons the wife, or fails to make sufficient provision for her maintenance, or where he is confined in the penitentiary for an unexpired term of more than one year, the wife, may, by action in equity, be empowered to use, enjoy and sell, for her own benefit, any property she may acquire or may have acquired; to make contracts, sue and be sued; may sell and convey by her own deed, etc. But the husband, upon manifesting a proper disposition again to live with his wife and make suitable provision for her or upon his release from the penitentiary, by his petition in such action may, in the discretion of the court, have all or part of said powers set aside, and be permitted to take upon himself the prosecution or defence of any pending action against her.

In Louisiana, their voluntary separation does not prevent their acquisitions from falling into the community.

In Maine, a wife whose husband has abandoned her and left the state, or is in execution of sentence in the state prison, may be authorized by the Supreme Judicial Court to contract as a feme sole.

In Michigan, an abandoned wife may, in the Probate Court, obtain relief like that in Massachusetts.

In Minnesota the support may be ordered, with or without a decree of separation.

In New Hampshire, the wife may, on abandonment, in the Supreme Court, obtain relief like that afforded by the Probate Court in Massachusetts.

In New Jersey, a husband neglecting to sup-

port his family, may be compelled to do so by the overseers of the poor as a "disorderly person." Equity will decree a sale of property of a neglected wife living separate and she may sell as if sole.

In New York, where a husband leaves his wife or child a public charge, his property may be seized by the superintendent of the poor or other proper officer, and on confirmation of the warrant by the court of sessions, may be sold, and the proceeds be applied to pay taxes, liens, repairs and insurance, and the residue for the support and care of the wife and child. If she has unjustifiably left him, and he offers to maintain her at a place of her own selection, the order will not be granted. Circumstances to justify a decree of maintenance must be such as to justify a decree of separation.

In North Carolina, a husband deserting his wife and living in adultery, forfeits all his rights to her personal property, or to property settled upon her at the marriage. A wife eloping with an adulterer, and not living with her husband at his death loses all right of dower.

In Ohio, if the husband neglects to provide for the wife, any other person may in good faith supply her with necessaries, and recover the reasonable value thereof from the husband, unless she has unjustifiably abandoned him and does not offer to return.

In Oklahoma, if the husband has deserted the wife, or is imprisoned, she may prosecute and defend suits in his name.

In Pennsylvania, if a husband neglects to provide for his wife, she may avail herself of the sole trader act. Any husband, who, for one year before his wife's death, has wilfully neglected to provide for her or has deserted her, forfeits all claim or right to her real or personal estate, after her death

as tenant by the curtesy or under the intestate laws. To establish her claim on his estate for her support, she must show that her withdrawal was not caused by her own misconduct. In a desertion case, the allowance may be increased or diminished, or revoked according to the changed relations of the parties. A deserting husband's right in his wife's estate is not restored by his merely having contributed to her support. Her deserting him and living in adultery, if condoned, does not deprive her of her rights as distributee in his estate. Where, in fulfillment of their agreement of separation the husband had given her certain cash and bank stock, it was held that he was not liable to prosecution for failure to support her.

In Rhode Island, a wife entering the state alone, may, after so continuing one year acquire the rights of a feme sole.

In South Carolina, if a wife leave her husband and go away, and continue with her advoutrer, she shall be barred forever of action to demand her dower. A married woman under the laws of South Carolina has the right to purchase any species of property in her own name, and to take proper legal conveyances therefor and to convey and be contracted with as if she were unmarried provided her husband shall not be liable for her debts, except for her necessary support.

In Tennessee, if a husband's cruelty has compelled his wife to leave him, she may have a decree for rents and profits of land in his possession acquired by her since the marriage.

In Texas, a wife suing for a divorce, may, on oath that the husband will waste either her separate property, or their common property, or the revenues, may obtain a writ of sequestration, or an injunction. His deserting her and living in adultery

does not deprive him of his interest in the community property, nor confer on her any rights except of management and if necessary of disposal thereof. The wife of a deserting husband, not suing for a divorce, cannot compel him to support her.

In Vermont, a married woman whose husband deserts her, or who from intemperance or other cause becomes incapacitated or neglects to provide for his family, may in her name make contracts for her labor and the labor of her minor children, shall be entitled to her and their wages, and in her own name may sue for and recover them. And the county court may invest her with the rights of a feme sole; may authorize her to sell her realty and his personalty for her support; and the chancellor may give her sole use of his realty; this may also be done in case of his imprisonment. The county court may prohibit a deserting husband from restraining his wife's liberty. His failure to support her, after notification by the overseer of the poor, is a misdemeanor punishable by fine of not more than twenty dollars.

In Virginia, by wilfully deserting her until her death, he forfeits all interest in her separate or other estate as tenant by the curtesy, distributee or otherwise. He is not liable for her ante-nuptial debts incurred in respect to her separate estate. Since the married woman's act, the husband's curtesy initiate in his wife's lands cannot be sold to pay his debts.

In West Virginia, a decree of separation may provide that the parties be perpetually separated and protected in their persons and property.

In Wisconsin, whenever the husband or wife is about to abscond or he refuses to support her, the mayor of the city, president of the village or supervisors of the town may issue a warrant, against

his or her goods, and on confirmation by the county court, sufficient shall be sold at auction for the maintenance of the wife. The property may be restored on the giving of bond.

In Wyoming, pending her suit for divorce, the court may prohibit him from restraining her personal liberty. He may also be required to give security for obedience to the orders of the court as to his property, but he is not liable for her antenuptial debts.

CHAPTER XII.

DIVORCE

Divorce, is the partial or total dissolution of a marriage by the state. The relation of two married persons to each other is not a mere personal relation depending on their will, but a status,—a legal condition established by laws,—which the state has full power to create, change and abrogate.

The relation is not a contract, and it is not a vested right; and a divorce, therefore, does not fall within prohibitions against the impairment of the obligation of contract, or the divesting of vested rights. A divorce necessarily changes the property rights of the parties, but this they are presumed to have contemplated. Still, it cannot divest such rights as have vested, for instance, through a marriage settlement. But it destroys mere inchoate rights, such as dower, and rights dependent on the continuance of coverture; and generally restores to each of the parties his or her property. Thus it is that the state can, on any terms it pleases, dissolve the marriage of any persons over whose domestic condition it has jurisdiction.

In the United States of America the "state" means the local government of each state, as the central government has no jurisdiction over the domestic condition of the inhabitants of the several states; the several states can grant divorces, the United States cannot.

The state can dissolve a marriage through its legislative department by special act—such a

divorce being called a legislative divorce; or through its judicial department—such a divorce being called a judicial divorce.

A legislative divorce is a divorce granted directly by the legislature, and a divorce granted by a court under a special act of the legislature must also be so regarded.

Some courts have held that a divorce is in its nature purely a judicial act, but parliamentary divorces were the earliest divorces in England, and legislative divorces were granted in the earliest days in some of the United States. As a rule, a state may grant a divorce unless expressly or impliedly prohibited by its constitution.

The extra-territorial validity of such a divorce and its effect depend generally on the same principles as govern the validity and effect of judicial divorces. Though a statute, it is in the nature of a decree; the marriage status is destroyed; the woman cannot claim any further rights in the man's property; nor the man in the woman's; and the validity of the divorce does not depend on the parties having had notice. This subject is now of little importance as legislative divorces are in a great majority of the states prohibited by the state constitution; therefore, the remainder of this chapter will treat only of judicial divorces.

A judicial divorce is a decree of a court, partially or wholly dissolving a marriage. Such a decree must be carefully distinguished from a decree of nullity; the first dissolves a valid marriage, the second declares that a valid marriage never existed. The fact that the word "divorce" has been used to include both classes of decrees has led to the most perplexing confusion.

A judicial divorce may be absolute or limited. An absolute divorce is usually called a divorce a

vinculo matrimonii, or from the bonds of matrimony. The earliest form of judicial divorce was a limited divorce—the divorce a mensa et thoro, or separation from bed and board; this divorce was granted in England by the ecclesiastical courts when no absolute divorces were granted except by parliament. Prior to 1858 an absolute judicial divorce was unknown.

In the United States both classes of divorces are known, though divorces a mensa et thoro are growing less and less usual.

Other forms of limited divorces have been established in many states, such as divorces containing prohibition against the marriage of the guilty party during the lifetime of the other or for a specified time, or without the consent of the court, or with the particeps criminis.

As will be seen in the discussion of the different branches of this subject, a decree of divorce may be void—a mere nullity, and so regarded in any court; or voidable—one that can be set aside on the application of a proper party to the court which granted it.

A divorce may also be valid as to one of the parties but not as to the other; may affect property in one place, but not in another; may be given full effect in one state, and no effect in another; or may be wholly valid, and be so considered everywhere.

The validity of a divorce depends on the jurisdiction of the court which grants it, and on its being obtained regularly and without fraud.

A decree declaring a pretended marriage void ab initio, or avoiding a voidable marriage, is properly called a decree of nullity, though not infrequently termed a divorce both in judicial opinions and in statutes. It will be necessary to discuss both

decrees incidentally in this chapter though they have been fully treated in the chapter on Marriage.

In determining what courts can dissolve a particular marriage, one must ascertain, first, what state has the necessary power and authority over the parties and their status; and secondly, to what court in that state that right and power has been delegated. In ascertaining this, one may have to consider the principles of international law and comity, the "full faith and credit clause" of the United States Constitution, and the particular statutes of the state where the suit is to be brought.

Jurisdiction at various times and in different states, has been made to depend upon the domicile or residence of the party or parties at the time of their marriage, the commission of the offense, or the time of bringing the suit; the place where the marriage took place, or the offense was committed; and the state to which the parties owe allegiance. But generally speaking, the whole question is one of the domicile of the parties.

Colonists may carry with them laws, but not courts; and therefore the ecclesiastical courts, which alone in England could grant divorces, were not imported into this country, and the jurisdiction of such courts can be obtained only by statute.

The United States courts have no jurisdiction given by statute, nor have they any ecclesiastical jurisdiction and so, although in the exercise of their chancery jurisdiction they may, like other equity courts, entertain a suit for alimony of a wife against her husband, they have no divorce jurisdiction. Nor could Congress vest such jurisdiction in the United States courts; for, as has been shown, marriage is not a national matter, but a domestic institution within the exclusive control of the several states.

In England there is now a special divorce court invested by statute with exclusive divorce jurisdiction.

In each of the United States, excepting South Carolina, divorce jurisdiction is given by statute to certain state courts. Such jurisdiction is not necessarily given by express words.

When certain causes for a divorce are named by a statute, but divorce jurisdiction is not given by name to any particular court, a provision giving jurisdiction in all "civil cases both at law and in equity" to certain courts includes divorce suits, although such suits are strictly not suits at law or in equity, but are suits sui generis.

When divorce jurisdiction is vested in certain courts, therefore, but no causes for divorce are named, such jurisdiction covers the canon and common law causes; but if certain causes are named all others are excluded by implication. State statutes are usually framed on the theory that divorce jurisdiction depends upon the domicile, and on the complainant's domicile in particular.

If the court has given jurisdiction it must grant the divorce, although its decree may have no extra-territorial effect. But the statutes will be construed, if possible, so as to prevent any confliction with the provisions of the United States constitution or of international law; in other respects they will be construed strictly, but so as to fairly carry out their spirit and intendment.

Every state has the right to regulate its own domestic policy, to determine the status of its own citizens, and to choose for itself the terms and conditions under which its own courts shall grant divorces; and a divorce granted in accordance with its laws must be valid within its own territory. But no state has primarily the right to push its domestic

policy beyond its boundaries and into other states, or to dissolve the marriage or change the domestic status of persons belonging to other states; and the acts of one state have force and authority in other states only by the consent of such other state—that is to say, by the comity of nations or international law, or by virtue of some paramount law, such as the United States Constitution, or a treaty between nations. But before considering the effect of the United States Constitution and of international law the nature of the proceedings for divorce must be determined.

A suit for divorce is not a mere personal suit, like a suit on a contract, or for a tort; nor is it a criminal prosecution; but it is a proceeding sui generis, involving not only persons—the husband and wife, but a thing—their marriage. It is thus a proceeding partly in personam and partly in rem. Jurisdiction is acquired in one of two modes; first, as against the person of the defendant, by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment beyond the property in question. The position of husband and wife, as husband and wife, depends upon the marriage laws under which they live, and is called their status. So far as a divorce suit is to affect this status, it is to change a thing independent of the parties, and is a proceeding not against the parties in personam, but against their status—in rem. Jurisdiction to pass a decree in rem exists over anything fixed in the state, and notice by publication or otherwise to the parties concerned is rather to give them every chance and to exclude suspicions of secrecy and fraud than to meet a necessity of service or summons. Jurisdiction to

pass a decree in personam depends, on the other hand, entirely on the courts having authority over the person, either by a regular summons or by his personal voluntary appearance in the suit. So far as a divorce suit relates to the status of the parties it is a proceeding in rem, and a proceeding against two distinct things—the status of the husband and the status of the wife. So far as it relates to alimony, or costs, or a prohibition against marriage, it is a proceeding in personam. So far as it relates to children, it seems to be a proceeding in rem,—the children must be in court.

By the United States Constitution the judicial proceedings of one state are given full effect in all the states; full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, according to the constitution. And the Congress may by general laws prescribe the manner in which such acts, records, and judicial proceeding shall be proved, and the effect thereof. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken. It would have led to absurdity if this had been held to mean that any judgment that one state should see fit to authorize should be valid not only in such state but in all the states; for this would have left each state at the mercy of all the others. So it has been frequently decided that this does not mean that any divorce valid where granted is valid everywhere, but that it applies only to divorces granted by courts which had jurisdiction over the parties and the subject matter. More accurately, it applies to divorces granted by a court which had jurisdiction over the

parties and their marriage status or to such portion of the decree as being in rem acts upon things within the control of the state where the decree is passed, and as being in personam, acts upon a person duly summoned, or voluntarily appearing. Thus, if both parties are domiciled out of the state where the divorce is granted, such state, having no control of their status, and therefore no jurisdiction over the thing proceeded against, in granting the divorce commits an act which no other state is, under the United States Constitution, bound to recognize, although there was full jurisdiction over the parties by their voluntary appearance in the case. If this were not true, a husband and wife could journey to any state that pleased them and there get a divorce, and the laws of their own state would be valueless. Likewise, as there are both the status of the husband and the status of the wife which the divorce can affect a case can easily arise where a court will have jurisdiction over one status and not over the other, and where the decree, as far as other states are concerned, will affect only the status of one of the parties. If the court has jurisdiction over the status of both of the parties, the decree must be recognized in all the states, although one of the parties was not summoned and did not appear. But such portions of the decree as are in personam will not have full effect unless the person has been duly summoned or has appeared.

The rules of international law are neither as specific nor as binding as the "full faith and credit" clause of the United States Constitution; but under them generally, as under that clause, a divorce suit is regarded as a proceeding against the status of the parties, partly in personam and partly in rem. The marriage state is recognized as a status, and to the country which has control over that status, which,

as will hereafter be shown, is the country where the parties are domiciled, and to that country only, is given the right to dissolve the marriage and change the status. But no country will consent to recognize a proceeding which is contrary to its views of public policy and morality, and will recognize even such divorces as the United States Constitution would not compel it to recognize, if they were granted in a manner which it itself regards as just and proper.

A person's domicile is the place or country either (1) in which he in fact resides with the intention of residence; or (2) in which having so resided, he continues actually to reside, though no longer retaining the intention of residence; or (3) with regard to which, having so resided there, he retains the intention of residence, though in fact he no longer resides there. It is in fact his permanent home. Such is domicile by the unwritten law; under divorce statutes it is frequently called "residence."

Divorce statutes frequently require the complainant to have been a "resident" of the state for a certain time. Under such statutes "residence" means domicile,—though distinctions have sometimes been made,—and the length of residence is required as a precaution against a pretended residence and fraud. The residence under such statutes must be actual, not merely wished for or intended; it must be bona fide, not taken for the purpose of divorce to be given up afterwards; it must be permanent, not a mere visit. The residence must exist at the time the suit is brought, though not necessarily at the time of the trial; and it must continue for the statutory time. A residence or domicile is not given up or interrupted by temporary absences for pleasure, business, or health.

In the United States at least, for the point does

not seem fully settled in England, husband and wife may have distinct and separate domiciles, so far as divorce jurisdiction is concerned. Ordinarily the husband has the right to fix the matrimonial home; he may move as often as he pleases, and his wife must follow or she deserts him; and whether she follows him in fact or not, her domicile in law follows his and is determined by his residence. But there are exceptions; if the husband and wife are divorced a mensa et thoro, the law secures to them separate homes, and the wife has her separate domicile; if he is guilty of conduct which justifies her in leaving him, she must have the right to live in a different place and to have her own domicile; and as she has the right to separate from him whenever she has a cause for divorce against him, in all such cases she may have her separate domicile. Authorities have gone further, and the Supreme Court of the United States has held that a wife may have her separate domicile whenever this is just and proper, while other cases have gone far towards holding that in all divorce cases husband and wife may have distinct domiciles. The identity of the wife's domicile with that of her husband is after all but a legal fiction, and a wronged wife who is not herself in fault may proceed against her husband in the place where she is actually domiciled. But if she is in fault, by the weight of the authorities, her domicile remains his, and the courts of his domicile have jurisdiction over her marriage status as well. If she is not in fault, but has a cause for divorce against him and is actually domiciled in another state she cannot, by virtue of the legal fiction that his domicile is hers, sue him in the courts of his domicile as though she were residing in the same state with him. And yet this is contradicted by other authorities; and if a wife is sued in her hus-

band's domicile she may file a cross-bill as answer though she be in fact domiciled in another state.

Jurisdiction to grant a divorce and dissolve the marriage of any person is, as has been shown, whether in the theory of divorce statutes or under the "full faith and credit" clause of the United States Constitution, or under the principles of international law, vested in that state which has control of the status of the person in question. The status of marriage is the legal position of a married person as such in the community or in relation to the community;—which community is it which is interested in such relation? None other than the community of which he is a member; that is, the community with which he is living, so as to be one of the families of it. But that is in fact the community in which he is living at home, with the intent that among or in it should be the home of his married life. That is the place of his domicile. So that generally speaking, divorce jurisdiction depends upon domicile. The only fair and satisfactory rule to adopt in the matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country where they are domiciled. It is both just and reasonable that the differences of married people should be adjusted in accordance with the laws of the countries to which they belong, and dealt with by the tribunals which alone can administer these laws. Every state makes its laws for, and has the right to control, the domestic status of those who make their home in it. When both parties are domiciled in the state where their divorce is granted there is no difficulty—the divorce is valid everywhere. In cases where the wife has a separate domicile, her status will depend on the laws of a different state from her husband; two different states are inter-

ested each in a different status arising from the same marriage. If in such case the court of the wife's domicile dissolves the marriage on her application, not only is such divorce no bar to the husband's application for a divorce in his state, but if he marries again on the strength of the divorce granted to her, his courts may deem him a bigamist; and such will be the effect of such a divorce, except by comity through which its validity may be recognized by such states as, by similar legislation or in some other way, have consented to the granting of such divorces for their citizens by other states. The courts where neither party is domiciled have no jurisdiction at all; and, as such suits are not merely suits between the husband and wife, but affect a public institution, their consent cannot confer jurisdiction, so that where a divorce is granted in a state, where neither party is domiciled but in a proceeding where both parties have appeared, though both parties may be personally bound, their marriage status is not affected. Therefore, the divorce court of any state where a husband or wife is then domiciled has jurisdiction to dissolve his or her marriage, and no court of any other country has such jurisdiction; but in a few cases the jurisdiction of another country may be recognized by comity. And except under unusual statutes, it does not affect this rule that the parties were married, or the offense committed in some other state, even though in such state it was no ground for divorce; or that at the time of the marriage, or the offense, the parties were domiciled elsewhere; or at the time of bringing the suit a domiciled party is temporarily abroad; or that a domiciled party owes allegiance to a foreign power.

The following summary of rules will be helpful:

Rule 1.—A divorce granted by the court of the domicile of both parties is valid everywhere under the Constitution of the United States, and under the principles of international law, although the defendant has neither been summoned nor voluntarily appeared, provided that the laws of the parties' domicile as to notice by publication or otherwise have been complied with.

Rule 2.—A divorce granted by the court of the defendant's domicile, or of the complainant's domicile in a case in which the defendant has been summoned or has voluntarily appeared is probably valid as to both parties everywhere by comity. If the defendant, though not regularly appearing or summoned has had actual notice, or even if he has had only constructive notice by publication or otherwise, the divorce will be regarded valid as to both parties by comity in such states as have adopted the policy of such divorces by similar legislation or otherwise. Even when not regarded as valid as to the non-domiciled party, such divorces will be regarded as valid as to the domiciled party everywhere by the United States Constitution and the principles of international law.

Rule 3.—A divorce granted by the court of a state where neither of the parties is domiciled will not be regarded as valid in any other state, although both parties have submitted themselves to the jurisdiction of the court. Now I understand the rule to be, that to give the courts of any state jurisdiction over the marriage relation between husband and wife, one of the parties at least must have a domicile within the state. Some of the decisions make further requirements; but no court has ever held that any less could be demanded.

Rule 4.—A divorce granted against a defendant who has neither appeared nor been summoned,

though valid as far as it affects such defendant's marriage status, will not be valid as far as it deals with alimony, or costs, or prohibition against another marriage, even in the state where it is granted. Every state or sovereignty has the right to determine the domestic relations of all persons having their domicile within its territory; and therefore, when a husband or wife is domiciled within a particular state, the courts of that state can take jurisdiction over the status, and for proper cause dissolve the relation. The decree so pronounced is a judgment in rem, and when not affected by fraud it is valid everywhere, and under the constitution of the United States such decrees are entitled to full faith and credit in all the states of the Union. But such judgments, when rendered on orders of publication, can only have effect upon the thing acted on by the decree, and such rights as are dependent upon that for its existence. Therefore, if a court, on severing the marriage tie, undertakes to render a decree in personam as to alimony, it can have no extra-territorial effect. But the marriage status being acted on and dissolved by the decree, the relation becomes severed, and continues so in all other states, and property rights dependent alone upon its continued existence must cease, not only within the state where the divorce is rendered, but in all other dominions. After such dissolution neither party can obtain rights dependent upon its continued existence. The husband is no longer entitled to curtesy and the wife's incomplete dower must cease. And so the court would not allow a wife dower who had been divorced on her husband's application on notice by publication.

Rule 5.—A decree against a defendant who has appeared or been summoned will bind him personally, though for want of jurisdiction over his mar-

ried status it may not affect that status in other states.

Rule 6.—The invalidity of a divorce due to want of jurisdiction may be shown in any proceeding in any court, such decree being conclusive of no jurisdictional facts. In a Michigan case the husband had moved into Indiana, and had taken up a false domicile and secured a divorce. The Michigan court went behind the record, declared the divorce void, and said: "And if the record by its recitals makes a prima face case of jurisdiction, no one in another state or country is concluded thereby; but he may show what the real fact was, and thus disprove the authority for making such a record; the jurisdiction of a foreign court is open, whatever may be the recitals relating thereto in the judgment."

Having ascertained what state has jurisdiction over his status, and which court in that state, the complaining party examines the statutes of that state and discovers what complaints he has which he can allege as causes for divorce, and also what kind of divorce he may ask for. He then brings suit, making the proper persons parties, alleging the material facts, and praying for the divorce and such other relief as he desires. Under the practice of the court, process issues against the defendant by summons if she is in the state, and by publication or otherwise, as provided by statute, if she is beyond the jurisdiction of the court. After the expiration of the proper time, either the defendant appears and files her answer alleging such defenses as she may have, or she makes default. The case then goes to proof before a commissioner or referee, or in open court before a judge or a judge and jury and the facts and law being found, the judgment or decree is entered. The decree, besides dealing with the marriage relation, may affect the property rights or

children of the parties. Moreover, during the pendency of the suit, preliminary decrees or orders may be given in the case, for alimony or for the custody of the children, or for the protection of some personal or pecuniary right of one of the parties. All these matters must be separately discussed.

As has already been shown, a divorce suit is not properly a suit at law or in equity, a suit in contract or for tort, but a proceeding sui generis. In the United States, divorce jurisdiction is generally vested in the equity courts, and the pleadings and rules of evidence are the same in divorce suits as in other suits in equity, except that the process against the defendant is somewhat different and the bill cannot be taken for confessed. These courts, granting divorces so far only as empowered by statute, apply the principles and practice of the ecclesiastical courts so far as they are suited to our conditions and the general spirit of our laws, and not modified or limited by our statutes or rules of court. In incidental matters and in the absence of special rules the ordinary practice of the court is followed.

In some of the United States a jury trial is a matter of right unless waived, and issues may be sent to the jury at the request of either party. Elsewhere no jury trial can be had, and the judge must determine the whole matter. Where there is a jury trial instructions are given to the jury as in other cases. Now, in England, issues may be sent to a jury in the discretion of the judge. In the ecclesiastical courts there was no jury, and the judge passed upon both the law and the facts. Such is the case in many states where divorce suits are brought in equity; the testimony is taken before a commissioner, and is then referred to the master in chancery, who makes his report, upon which the judge enters the decree. Sometimes statutes provide for

a reference of a case to a referee who reports to the court, and the court decides the case. Neither a judge nor a referee or master can delegate his authority. Sometimes statutes provide that the case must be tried in open court. The different modes of trial are too much a matter of local practice to be fully discussed here, and indeed a discussion of them would be of no consequence to the reader.

Amendments will be allowed as in other cases, and bills of particulars may be demanded, and the court may order important papers to be produced for its inspection. Of its own motion the court can continue the case that new evidence may be taken. The parties may by mutual consent discontinue their suit. The complainant may withdraw his charges; but he cannot discontinue his suit if an answer in the nature of a cross bill has been filed. There may be nunc pro tunc judgments as in other suits. New trials may be granted as in other cases whenever justice shall seem to require.

In general, the husband and the wife are the only necessary and proper parties to a divorce suit; but in cases of disability the suit may have to be brought or defended by a guardian, committee, or next friend. In England, if the cause alleged is adultery, the paramour must be a party if known. Speaking generally, no one but the husband or wife in person can be a complainant, as the suit is purely a personal one, and the complaint must be signed by the complainant in person. This will appear in the succeeding discussion. But any third person whose pecuniary rights are involved may be made a defendant. The state is always an informal party defendant although not named, for the protection of the public interests of the state and the children of the parties, and in some states is formally represented by counsel.

As a general rule, a wife brings or defends a divorce suit as though she were unmarried. The practice in divorce suits, as has been shown, is partly that of the ecclesiastical courts, partly that of chancery court, and partly the result of statutes of the particular forum. A wife sued and defended alone in the ecclesiastical court, just if she were not married.

In equity a married woman could not be sued at all without her husband in a personal suit, and in a suit respecting her property her trustee or husband had to be joined; nor could she bring suit in equity without joining her husband, trustee, or next friend. As a matter of convenience and indeed of necessity, the ecclesiastical practice has prevailed, so that in the United States a wife, independently of statute, usually brings her suit for divorce or defends the same alone and in her own name, though in cases where she prays for some equitable relief as to her pecuniary rights it is usual to join her next friend, as she would were she suing for the same, independent of the divorce. In some states, moreover, the statutes deal with this subject, and the wife is authorized to sue alone; and where she is authorized to sue her husband in her own name she may so sue him, though there is another party joined with him as defendant. When the wife improperly sues alone the objection must be made by demurrer, and cannot be made at all after the answer is filed. Although the wife may be authorized to sue alone, this does not necessarily imply that she may make contracts for the services of attorneys, and concerning other matters relating to the prosecution of the case, as though she were not married.

Under the ecclesiastical practice, a guardian ad litem was appointed to conduct the suit for an infant complainant or defendant. In ordinary suits

in equity the practice is the same. And it would therefore probably be proper independently of the statute to have a guardian ad litem appointed for any infant party to a divorce suit. But this is not necessary, as the courts have held that one who is old enough to marry is old enough to apply for a divorce, and that one who is old enough to acquire matrimonial rights is old enough to enforce them; so that for the purposes of a divorce suit full age is the marrying age, and an infant husband or wife may sue or defend in his or her own name.

Whether a divorce may be granted while one of the parties is insane has been much disputed, as great injustice may be done an innocent party both by the refusal and by the granting of divorces in such cases. There is a difference between the case of an insane complainant and that of an insane defendant, and the better view seems to be that, independently of statute, no divorce will be granted on behalf of an insane complainant, but that the insanity of the defendant, which has arisen after the offense complained of, will not bar the complainant if the case is strictly proved.

The right to a divorce is strictly a personal right which can be waived by the innocent party, and which cannot be asserted except by his or her will; therefore, if the injured party be insane, no matter how outrageous the conduct of the other party, no matter what scandal may result, no relation or guardian or committee can bring a suit for divorce; and if a divorce is obtained during the insanity of the complainant it will be regarded as a fraud, and will be declared void by a court of equity on the application of a proper party. It has, however, been held that this reasoning does not apply to a suit for a mere separation, or a nullity suit, or a suit for alimony, or a suit for a share in the husband's es-

tate after his death. In England, under the general divorce statute, the guardian of a lunatic may bring such a suit; and in some of the United States there are similar statutes.

The fact that a party, after being guilty of conduct entitling the other party to a divorce, becomes insane, should not bar such other party's remedy; and the court, which takes care of the public interest, will likewise protect the insane defendant from fraud and abuse, but must grant the divorce if the case is clearly made out. The insane defendant may appear and defend by her guardian or committee.

In some states, in order to preserve the property of spendthrifts, guardians may be appointed to take charge of such property. Such a guardian could not sue for divorce in behalf of the spendthrift, because as we have seen in the case of an insane complainant, the right to bring such suit is strictly personal, and depends upon the decision of the complainant himself. But the fact that a guardian has been appointed for a spendthrift does not invalidate the spendthrift's power to decide for himself whether he will bring suit for divorce, and he may bring such suit in his own name as though free from disability. There may be other disabilities created by statute, and how they would effect the right to sue for divorce can be judged from the reasoning in the cases already discussed and from the wording of the statutes.

As has already been seen, the right to bring suit for a divorce is a personal right, and no one except the aggrieved husband or wife can exercise this right, even though his feelings be outraged and his pecuniary interests jeopardized by the continuance of the marriage. Nor can a third person have himself made a party, whether he be an alleged para-

mour seeking to clear himself, or a creditor seeking to secure his debt; but in such cases the courts will allow such persons to make suggestions in the trial of the case and to cross examine the witnesses. Except under statutes the complainant has no right to join an alleged paramour as a party defendant; it is only so far as pecuniary rights are affected that a third person may be made a defendant. A wife may make anyone a co-defendant who claims any rights in property to an interest in which she may be entitled in case the divorce is granted. She may pray an injunction against a third party to prevent the consummation of a fraudulent assignment, may seek discovery against a suspected fraudulent assignee, and may ask to have a fraudulent deed set aside. In such cases she not only may, but should, make such persons parties; for a divorce suit of itself does not create the lien of lis pendens on the husband's property. But a wife cannot join with herself as complainant the guardian of her children, and seek in the same case a divorce and the settlement of property rights not connected therewith. Third persons who have been made parties to a marriage settlement between a husband and wife need not be made parties to a divorce suit between them; nor need their children be made parties, deep as is their interest in the result of the suit.

Marriage is not a mere personal relation, but a public institution, on the purity and integrity of which the welfare of society largely depends; not alone are the personal interests of the parties to a divorce suit involved, but the interests of the children and the interests of the public, as the public stands related to and affected by the institution of marriage; and for this reason marriages cannot be dissolved by the consent of the parties, and it is the

duty of the divorce court in all cases to see that a cause for divorce is fully proved, and that there has been no imposition upon the court. In this way the state through its judiciary is represented in every divorce case; and the court will of its own motion carefully scrutinize the evidence, listen to the suggestions of outsiders, call for an explanation of suspicious circumstances, and even postpone the case and seek to bring about a reconciliation of the parties where this seems proper and desirable. In order to relieve the courts of the responsibility in such matters, laws have been passed in some countries and states providing that the state shall appear in divorce cases and be represented by counsel, whose duty it is to see that the divorce is granted only after being really and honestly contested. In this sense the state is always a party to divorce suits, and divorce suits are triangular. By statute in England, the King's proctor intervenes in cases where collusion is suspected and contests the suit. In Scotland, the lord advocate so appears. In Georgia, the court itself must look into the bona fides of the suit, or appoint the solicitor general or other counsel to do so. In Indiana, if no defense is made by the defendant, the public prosecutor must make one. And in Kentucky, the county attorney must resist all divorce suits.

Upon the death of either party to a divorce suit the action abates and cannot be revived. This rule applies to the status and rights dependent solely upon it, such as counsel fees and alimony, but not necessarily to other matters for which relief is prayed as a question regarding a marriage séttlement, or property right in which third persons made parties are interested, as to which matters the suit may perhaps be revived.

If a party dies after the case has been taken

under advisement by the court, the court may pass a decree dated the day of the submission. If a party dies after the case has been fully tried, but before it has been submitted to the jury, judgment may be entered as of the first day of the term;—such procedure being allowed under the particular laws of the forum.

If, pending an appeal, a party dies, new considerations arise. If a divorce has been refused, the action abates finally. If a divorce has been granted, the suit likewise abates, though perhaps, as to third persons interested in the property, the suit might be revived; and there are statutes in some states under which the case may be carried to its final determination.

The bill or libel of complaint in a divorce suit need not be in any particular form or contain any technical expressions; it need only set forth the relief desired, and the grounds therefor clearly and briefly, so as to make out a good prima facie case. It should be signed by the complainant in person, not by attorney, and should make the proper parties defendants. It need not necessarily be sworn to, though this is the usual practice, and is necessary in some places by statute.

The bill must allege every fact upon the existence of which the authority of the court to grant the divorce rests. It must set forth substantially in the terms of the statutes of the forum (1) all facts necessary to give the court jurisdiction over the parties; and (2) all facts necessary to give the court jurisdiction over the subject matter, to wit:—the marriage and cause or causes for divorce, if divorce only be prayed, and such other facts as entitle the complainant to any ancillary relief that may be prayed. The allegations of the grounds of divorce must be made with all possible particularity in order

that the defendant may be appraised of the nature of the charges and be able to properly prepare the defences. Whether there must be allegations negativing the defences depends largely upon the statutes and practice of the particular state; in principle there need be no such allegations, these are for the defendant to make; but in some states they are expressly required by statute, and in others they have been held necessary by implication from statutes allowing a divorce only to a party without fault, or an injured party. Moreover, any fact may be alleged which seems material, without doing any particular harm. It is well always to deny present cohabitation.

The bill of complaint should pray specifically for the relief desired, and it is well to pray for such further relief as the case may require. In equity, if there is a prayer for special relief and also one for general relief, although a case for specific relief is not made out, such relief will be granted as it appears the complainant is entitled to. If an absolute divorce is prayed, a limited divorce may be granted under a general prayer; but a prayer for divorce does not cover a decree of nullity. It is usual, though not nesessary, to pray for alimony and the custody of the children in the bill of complaint; but this is not necessary as it may be done by substitute petition. A prayer may be made for alimony pendente lite, for counsel fees, for custody of children pendente lite, for an injunction to prevent the alienation of the husband's property to defeat alimony, or to prevent marital interference during the suit, and for such other relief as may be sought.

Two or more causes for the same kind of divorce may be joined in the same complaint, but a cause for absolute divorce may not be joined with a cause for limited divorce. A suit for other ancillary

relief may be joined with the suit for divorce, but not a mere collateral suit, such as the enforcing of a deed, or the quieting of a title, or the settlement of an estate.

As the first principle in divorce suits, grounded on the public interests, is that the case shall be decided on its merits, a court will in all cases, unless great injustice would thereby be done, allow a complainant to amend his bill of complaint. So, too, a supplemental bill of complaint may be filed at any time during the suit, covering matters which have arisen or been discovered since the filing of the original bill.

Most defects can, of course, be obviated before a final decree by amendment or by supplemental bill; but if not thus removed more or less serious results may follow. When a jurisdictional fact does not appear on the face of the bill of complaint, the court can take no valid step; and it will not enter a decree of divorce, though a good case has been proved and though the defendant makes no objection, unless the proper prayers and allegations are contained in the bill. No proof can be properly and effectively produced except under the allegations; if these are vague they furnish no ground for proof. If the averments are insufficient the bill will be dismissed; if immaterial they will simply be ignored and treated as surplusage; if scandalous and immaterial they will be stricken out; if indefinite they will not support proof, and will justify a demand for a bill of particulars. If the bill is not properly signed it will be dismissed. And as long as the bill is defective no alimony pendente lite or counsel fees will be allowed. But the answer may waive the vagueness of the allegation.

Statutes alone create causes for judicial divorce and to justify a divorce the ground of complaint

must be a cause for divorce by the laws of the forum. In every state where a divorce can be granted there are divorce statutes, which should be referred to in connection with any question discussed in this chapter. In England and in each of the United States, with one exception, divorce is allowed, though the causes recognized are most diverse. The exception is South Carolina, where no divorce is allowed for any cause.

As to the time of the commission of the offense alleged as a cause for divorce:—it should have been committed after the passage of the statute making it a cause for divorce, and before the filing of the bill of complaint; though a statute referring expressly to offenses already committed would not be unconstitutional, and an offense committed after filing the bill of complaint may be set up in a supplemental bill.

As to the place of the commission of the offense alleged as cause of divorce:—in the absence of special statute this is immaterial; adultery committed abroad is as good a ground for complaint as adultery committed at home. A statute making imprisonment in the state prison a cause for divorce has, however, been held to refer only to imprisonment in the prison of the state of the forum.

The causes for divorce are divided as follows:—First, causes existing at the time of the marriage and affecting the validity thereof, rendering it void or voidable; these are not properly causes for divorce at all, but are causes for nullity of marriage; and second, those arising after the parties have become husband and wife, which are the only real causes for divorce. Both these kinds of causes are enumerated in the same statutes in many states, the statutes authorizing the same kind of divorce

therefor; and the greatest confusion has been prevented only by intelligent interpretation.

The causes for divorce recognized in the statutes of the various states are as follows: (1) the incapacity of one of the parties at the time of the marriage, including nonage, mental incapacity, physical incapacity or impotence, consanguinity and affinity, and difference of race; (2) defects in the consent of the parties to be married, arising from error, fraud or duress. These causes are discussed in the chapter on Marriage; (3) any offense in the discretion of the court; (4) adultery; (5) abandonment or desertion; (6) cruel and abusive treatment; (7) gross and confirmed habits of intoxication; (8) refusal to support; (9) crime; (10) obtaining divorce in another state.

The legislatures of some states have left the grounds for granting a divorce more or less within the discretion of the courts; a Connecticut statute allows divorce for other causes, and for any such misconduct as permanently destroys the happiness of the petitioner, and defeats the purpose of the marriage relation. A Kentucky statute allows divorce for any cause in the discretion of the court. Though the constitutional right to do this has been recognized the policy of such statutes has been much questioned and in most places the statutes themselves have been repealed.

When the courts are thus given a discretion, it is meant that it must be exercised upon some salutary principle, and not in such manner as to reduce the marriage relation to a mere state of concubinage, at the mercy of the parties and the courts. The discretion must be exercised in conformity with the common-sense and feelings of the community, and the principles of the existing legislation on divorce. The court should prescribe to itself such

principles as sound law-givers, who allow divorce at all, would send as a rescript to a judiciary.

When any conduct destroying the happiness of the parties, is a cause for divorce, it is not enough that a party has alleged that certain conduct has destroyed the happiness and defeated the purposes of the marriage, but the court must see that the welfare of the parties and of the community demands the divorce. An appeal lies from such discretionary decision but the decision will be reversed only in a very clear case. When the statutes of the state allow divorces both for specified causes and for general causes in the discretion of the court, the two grants are distinct; the court cannot in its discretion refuse to grant a divorce for a specified cause, nor can a specified cause be proved under a general allegation and appeal to the court's discretion; nor can the court grant a divorce for an offense of the nature of the specified cause, but lacking some essential element; but if there is a combination of circumstances bearing on several distinct causes, but not quite sufficient to establish any one, the discretion may be exercised. Under a statute enumerating certain causes and leaving further causes within the discretion of the court, the latter provision was held to cover only such causes as were known at common law, and were not named in the statute, and not therefore insanity. When a statute says that for certain causes a court "may" grant a divorce it does not mean "shall" but leaves the matter in the sound discretion of the court.

As a cause for divorce, adultery is almost universally recognized; but not always simply adultery, for aggravating circumstances, such as bigamy, cruelty, or desertion, or scandalous or repeated adulteries, are sometimes required.

Adultery may be defined as the voluntary

sexual intercourse of a wife with a man not her husband, or of a husband with a woman not his wife. It makes no difference whether the other party is married or single, is free or a slave. A bona fide belief of a husband that his wife is divorced from him does not save his intercourse with another woman from being adultery for the purpose of divorce, but a bona fide belief that she is dead, it seems, does. To constitute the offense the act must be voluntary, and it is not adultery if a woman is ravished, or is insane at the time of the intercourse. When to be a ground for divorce, adultery must be accompanied by bigamy, the adultery and bigamy must be with the same person; if cruelty is required in addition to the adultery, it must be legal cruelty; if desertion, it must be legal desertion, and must be voluntary without the other party's consent, or justifying conduct. When living in adultery is required, a single or concealed act will not suffice, though the intercourse need not continue to the time of bringing the suit. In Kentucky, lewd and lacivious conduct without proof of the act amounts to adultery.

As already shown, the place of the commission of the adultery is immaterial; and so is the time, provided that the adultery took place before the filing of the bill or supplemental bill, and after the passage of the act making it a cause for divorce.

It is with regard to the allegation and proof of adultery that most questions arise.

Adultery must be alleged as adultery; and the particulars of time, place, person, and circumstances, as far as known, should be alleged,—the allegation of place and person being the most important. And the complainant must know enough to make a specific charge, and he cannot allege adultery generally with the intention of picking up

the evidence as he goes along; nor can he seek to find out facts showing adultery by a bill of discovery against the defendant. General allegations are, however, sufficient when founded upon the defendant's pregnancy without access of complainant, or venereal disease, or habitual adultery. And so the allegation that the defendant is a prostitute is a sufficient allegation of adultery, but this allegation must be proved if made, and will not support proof of a single act of adultery; and the same may be said of an allegation that the defendant has been living in adultery. In regard to these allegations, the practice of different states is more or less strict; and too general allegations may be waived by the defendant if he files his answer without objecting. Fuller allegations may be obtained by a bill of particulars. And defects may be obviated by amendment.

The chief importance of the allegations lies in their sufficiency to support the proof that may be offered; the proof must correspond with them. Proof of adultery with A will not support an allegation of adultery with B; nor will proof of adultery at A sustain an allegation of adultery at B. The particular offense alleged must be proved; if several offenses are alleged, all need not be proved.

As to the nature of the proof, adultery may be established either by the evidence of parties who saw the act committed, or by proof of facts from which intercourse may be inferred. It is a fundamental rule, that it is not necessary to prove the direct fact of adultery, because, if it were otherwise, there is not one case in a hundred in which that proof would be attainable. It is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case, almost, the fact is inferred from circumstances that lead to it from a fair in-

ference as a necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion cannot be laid down universally, though many of them, of a more obvious nature and of more frequent occurrence, are to be found in the ancient books. At the same time it is impossible to indicate them universally; because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances apparently slight and delicate in themselves, but which may have the most important bearing in decisions upon the particular case. The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a harsh and intemperate judgment, neither is it to be a matter of artificial reasoning, judging upon such things differently from what would impress the careful and cautious consideration of a discreet man. The facts are not of a technical nature; they are facts determinable upon common grounds of reason; and courts of justice would wander very much from their proper office of giving protection to the rights of mankind, if they let themselves loose to subtleties, and remote and artificial reasonings upon such subject. Upon such subjects the rational and legal interpretation must be the same. On account of the secret and private nature of the offense, direct proof by witnesses who saw the act committed is very rare; and the best proof that can be expected is evidence that the parties were seen in the same bed, or lived together in the same house as husband and wife; equally good is evidence that the defendant gave

birth to a child without access of the complainant, or had a venereal disease too long after marriage to have been the result of intercourse before marriage. But in the mass of divorce cases adultery is proved by circumstantial evidence of a great number of details in the life and conduct of the defendant; and the circumstances from which adultery may be inferred must be such as to satisfy a reasonable and just man almost beyond reasonable doubt; that is to say, that while the same amount of evidence is not required as in criminal cases, adultery is in fact a crime, and is the most serious of all offenses against marriage, and can be proved only by the clearest, most positive, and most satisfactory evidence, and will not be held as proved if the facts on which the charge is based are consistent with innocence.

The proof should be two-fold. It should show a criminal attachment between the parties involving a mutual intention or desire to indulge in intercourse and opportunities to gratify that criminal desire. If the criminal intention is shown, and opportunities have been ample, adultery will be presumed. Opportunities alone are not enough; nor are opportunities with mere suspicious circumstances; but a number of suspicious circumstances, none of which alone would be sufficient, may, combined, justify the conclusion of guilt. If a man goes to a house of ill-fame and shuts himself up with a prostitute, there can be little doubt of his guilt; and his entering such a house is strong evidence against him which he must explain,—for example, by showing that he was employed as agent of a vice society to go there; so it is almost conclusive against a woman when she goes to such a house with a man not her husband, or unattended; but she may explain that she did not know the nature of the house,

and was induced to go there by agents and spys of her husband. If criminal intercourse is shown to have taken place between two parties, it is presumed to continue as long as they live under the same roof. A judge must decide on the evidence as a jury would.

The witnesses in a divorce suit for adultery constitute an important factor, as the evidence is so largely circumstantial, and slight variations may change the whole significance of doubtful situations. The husband or wife can, in general, testify; but even where the bill and answer are taken as evidence, a divorce will not be granted without other evidence. Confessions of adultery are, however, admissable, if not made for the purposes of the suit, and if not obtained by fraud. The witnesses usually called to prove adultery are servants, neighbors, children, the paramour, the paramour's husband or wife, detectives, and prostitutes. The evidence of young children is not entitled to much weight. The testimony of the paramour should be listened to with caution, and should always be corroborated. And prostitutes, while not wholly unworthy of belief, cannot be relied upon. The court is not bound to believe any witness. More will be said as to witnesses later on in this chapter.

The defenses in suits for adultery are either in the nature of absolute denial, or of confession and avoidance. Under the latter head are connivance, collusion, condonation, recrimination and limitations, which I shall discuss hereafter.

Next to adultery, cruelty is the most common cause for divorce. Like adultery, it was a cause for limited divorce in the English ecclesiastical courts; and in the United States it is now found as a cause for absolute divorce, and for limited divorce, according to the various statutes. In general, in con-

struing the statutes of the various states, the rules of the ecclesiastical law, as laid down in the ecclesiastical reports, are followed as far as possible.

As a cause for divorce, cruelty is the wilful and persistent causing of unnecessary suffering, whether in realization or in apprehension, whether of body or of mind in such a way as to render cohabitation dangerous or unendurable. Cruelty under the civil law is called saevitia. In respect to the law, the question naturally occurs, what constitutes cruelty in view of the law. It is difficult and hardly safe, and at the same time it is unnecessary, to define it affirmatively with precision. It can only be described generally, and rather by effects produced than by acts done. That the duty of cohabitation is released by the cruelty of one of the parties is admitted, but the question occurs, what is cruelty? Mere austerity of temper, petulence of manners, rudeness of language, a want of civil attention and accommodation, occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty. I never knew of a case in which the court granted a divorce without proof given of a reasonable apprehension of bodily harm. I say apprehension, because assuredly the court is not to wait until the harm is actually done; but the apprehension must be reasonable; it must not be an apprehension arising merely from an exquisite and diseased sensibility of mind. It is not mere disagreement or incompatibility, for the parties take each other for better or worse. Cruelty may be of a husband to his wife or of a wife to her husband. We must consider, in judging whether any particular conduct has been cruel, the intent of the person whose conduct is in question, its persistence, and its effect on the other party's body or mind.

The injury must be done deliberately; it must

be wilful. Vices, gaming, gross extravagance, might occasion great suffering and bodily ill health; yet this would not be cruelty. And the same may be said of a disagreeable temper and rudeness, and want of affection, and neglect, and of many mistakes due to ignorance. If a husband in good faith charges his wife with crime it is not cruelty but if he does it to make her suffer, it is; so if he maltreats the children, it is not cruelty; but if he does this to annoy his wife and make her suffer, it is. And as the conduct must spring from a free will, the acts of a person while insane, are not cruelty; but if the conduct results from an insane delusion, or from madness caused by drink, it may constitute cruelty. The intent is generally shown by the persistency of the party in the course of conduct complained of, and the intent to injure arising suddenly under great provocation would not perhaps fill the requirements as to deliberateness. A great provocation may justify a certain amount of violence.

Generally, a divorce will not be granted for a single act of cruelty. But acts of cruelty need not become a fixed habit before relief can be had. It is presumed that a single act standing by itself will not be repeated; but if the single act is one step in a course of conduct, and the court is satisfied that similar acts are likely to occur, the single act will be sufficient. In such cases the reasonable apprehension of the injured party, and the mental suffering thereby occasioned, constitute the cruelty. So that under different circumstances a single act or an entire course of life may constitute cruelty.

Personal violence or maltreatment of the person to the injury of health, is legal cruelty. So is conduct endangering life, limb, or health. So is wilfully or recklessly communicating to her a disease, such as the itch, or a venereal disease, or

impairing her health by excessive intercourse. But every slight touching is not a bodily injury. What is really injurious may depend upon the party's constitution; and a gentle fragile woman might be granted a divorce where an Amazon or a Spartan would not. And so acts may be cruel to a woman who is pregnant or otherwise ill, which would not be cruel to one in good health.

That the infliction of mental suffering is not cruelty unless the suffering be occasioned by reasonable apprehensions of bodily harm has been repeatedly decided. But in cases where cohabitation, and life itself almost, is unbearable, the old rule should certainly be relaxed. Conduct which produces perpetual social sorrow, although physical food be not withheld, may well be classed as cruel, and entitle the sufferer to relief. Meaningless threats, not intended to be executed, and so understood by the party threatened, are not sufficient. Words of abuse and of reproach create only resentment, and are not legal cruelty; but words of menace, intimating a malignant intention of doing bodily harm, and even affecting the security of life, are legal cruelty. The court is not to wait until the threats are carried into execution; but is to interpose where the words are such as might raise a reasonable apprehension of violence, and excite such fear and terror as make the life of the wife intolerable. If rendering the life intolerable be the true criterion of cruelty, what can have that effect more than continual terror, and the constant apprehension of bodily injury? It may be shown that there were mere words of heat, but prima facie it is to be understood that a man means what he says. Many of the statutes by their terms cover such mental suffering as render the party's condition intolerable. So it is that in many states, foul, obscene, and disgusting language, calculated

to degrade a wife and wound her feelings, may constitute legal cruelty. So of foul and indecent conduct, as where a husband makes a brothel of his own house. But the mental suffering, as we have seen, must result from acts intentionally directed towards the sufferer.

Instances.—The cruel conduct must be such as to render the cohabitation of the parties unsafe or unendurable. Thus a husband frequently drunken who chokes his wife, coarsely accuses her of unchastity, locks her up and threatens to smash her head with a brick, is guilty of such inhuman conduct as endangers her life. So repeated application of coarse epithets to a wife, accompanied once by actual bodily harm and once by threats to take her life has been held to be legal cruelty. But mere smashing of dishes, threats to kick the wife out of doors and grossly improper language have been held insufficient to constitute legal cruelty. Pulling the hair out of the wife's head is not only cruel, but evidence of deliberation. Mere disregard of the marriage obligations is not cruelty; nor is want of affection; nor are slight differences and quarrels; nor is desertion; nor is failure to support; nor is refusal of sexual intercourse though this may be an indignity; but excessive intercourse may be cruelty, or when the wife's health is delicate or where the husband has a venereal disease. Mere immoral conduct is not; nor is masturbation in the presence of the wife; but openly consorting with loose females may help to make out a case of cruelty. Adultery and habitual intemperance are not; though drunkenness causing ill-treatment may be. Whipping a wife is cruelty, and so may be maliciously charging her with crime, or with unchastity, or maltreating her children. But mere provoking and exasperating conduct is not. Nor is it cruelty necessarily for a

husband to forbid his wife from going to church, or visiting her family or relatives. Nor is a bona fide groundless charge of crime or suit for divorce.

A party charged with cruelty may justify himself or herself by showing that the other party was equally to blame. But a husband cannot justify himself on the ground that he was exercising his marital rights.

As we have seen, a husband has no right to whip his wife. By the old law he could give his wife "moderate correction"; but the rule now seems to be that he can use force for prevention but never for correction. The law is for the relief of an oppressed party and the courts will not interfere in quarrels where both parties commit reciprocal excesses and outrages. Violence inflicted in a mutual contest is not legal cruelty as in a case where a wife refused to give up to her husband his keys, and was thrown against the wall and bruised in the scuffle that ensued. There is a certain conduct that may be justified by the provocation; but groundless or unreasonable jealousy is not sufficient provocation for bodily injury, nor is bad temper. And nothing could justify a husband in kicking his pregnant wife in the side, or in attempting to burn his wife alive, or in occasioning by his violence a premature delivery, or in refusing to his wife the common use of air, or, in fact, in any acts which involve imminent danger to health or life. These instances are taken from adjudicated cases. The discussion of justifying conduct is in reality a branch of the subject of recrimination, which will be treated further on in this chapter.

The charge of cruel conduct should be set forth in the bill of complaint substantially in the words of the statutes of the forum, and the material facts relied on should be set forth, in some states with

considerable minuteness as to time, place, and circumstances, in others quite generally, according to the practice of the court. There should be a general allegation, as of cruel conduct, during a certain time, and special allegations of particular facts, such as infection with venereal disease. If the bill is too general the defect must be taken advantage of by special demurrer in some states; though of course, the generality of the bill may be waived and particulars demanded. And the bill may generally be amended.

The proof must correspond with the allegations general and specific. Under a general allegation, such as habitual cruelty, special facts besides those alleged may be proved. When only special facts are alleged it is doubtful how far proof of general conduct is admissable. All the facts alleged need not be proved, but only sufficient to constitute a ground for divorce. The parties can testify by virtue of statutes, but not otherwise, and their confessions may be given in evidence, and declarations made at the time of the cruelty may be proved as part of the res gestae. So bruises may be shown if connected with the defendant's conduct as evidence of its violence, and drunkenness, abusive language, etc., may be shown to prove the intent.

The defendant may deny that he was guilty of cruel conduct, or plead justification, recrimination, or condonation which are hereafter discussed.

Abandonment or desertion of one party by the other to a marriage is quite commonly a cause for divorce under statutes in the United States and Great Britain. In some states it is a cause for both absolute and limited divorce; in others only limited divorces can be granted.

Desertion is a husband's or a wife's wilfully and wrongfully ceasing to cohabit with his wife or

her husband. To establish desertion three things must be shown: (1) Cessation from cohabitation continuing the necessary time; (2) the intention in the mind of the deserter not to resume cohabitation; (3) the absence of the other party's consent to the separation, or conduct justifying the same. The mere fact that the parties are living apart does not even raise a presumption of desertion, but voluntary living apart is in some states a separate cause for divorce. Living apart by consent is not a ground for divorce as desertion. But if continued for five years it is a cause for divorce in Kentucky and Wisconsin. Refusal of marriage intercourse is not desertion; neither is absence, unless the absent party's intent to desert is shown, and it is sometimes made a separate cause for divorce also. Absence unheard of for seven years is a cause for divorce in Connecticut and Vermont, and for three years in New Hampshire. A separation caused by a party's imprisonment is not desertion, because it may be involuntary; and it has been made a separate cause for divorce. The above definition should be qualified by the statement that one who wrongfully drives his or her spouse away is the deserter. This matter will be discussed later on.

One of the elements of the desertion is that the parties must have separated; there must be a cessation of cohabitation. Ceasing to cohabit means ceasing to live together as husband and wife—ceasing to have a common home. For an absolute and unjustified refusal to allow such intercourse has been held not to constitute desertion, and the fact that there was a single night of intercourse during the period of the wife's persistent refusal to make her home with her husband has been held not to break the continuity of her desertion. But, on the other hand, an offer by a husband to take his wife

back into his house but not to his bed has been held not an offer to renew cohabitation. The question of support is not involved in the questions relating to desertion, unless under the provisions of some particular statute. For if a husband refuses to live with his wife, he does not, by supporting her, prevent his separation from being desertion; and his refusal to support her is not in itself desertion, nor does it change the character of a separation.

The separation must continue uninterruptedly for the necessary time. This time begins, the separation existing when the intent to desert is formed, and runs on, no matter where the parties may be, as long as they are apart; but it does not run during the complainant's consent to separation, or while this is due to the complainant's fault. If cohabitation is renewed for a time and then the parties separate again, the periods before and after the renewal cannot be added together. But though the parties are apparently together for a time this is not a renewal of cohabitation if the intent to desert continues. Thus, a wife's return to the family home from time to time to look after the children and to attend to certain household duties, she intending all the while not to resume cohabitation, does not break the course of the desertion; nor, under similar circumstances does sexual intercourse. On the other hand, a mere offer to resume cohabitation made by the deserting party in good faith and unconditionally and before the full statutory period of the desertion has elapsed, stops the desertion and prevents a divorce for this cause. The offer must be made in good faith; it must be unconditional, and it must be made before the desertion has lasted long enough to constitute a cause for divorce. It is possible for a husband to live in the same house with his wife and yet so seclude himself from her as to desert her.

The husband's home is the matrimonial home and the home of the wife. He has the right to say where they shall both live; and he may change his residence as often as his business, health, or pleasure demands, and she must follow; if she does not, she deserts him,—presupposing, of course, that the husband is not in fault, as hereafter shown. So, if the wife undertakes to change the family residence and the husband will not follow she deserts him. It is not, however, an entirely arbitrary power which the husband may exercise in this matter; his acts must be reasonable and in good faith. While we must recognize fully the right of the husband to direct the affairs of his own house and to determine the place of abode of the family and that it is in general the duty of the wife to submit to such determination, he must exercise reason and discretion in regard to it. If there is any ground to conjecture that the husband requires the wife to reside where her health or her comfort will be jeopardized, or even where she seriously believes such results will follow as will almost necessarily produce the effect, and it is only upon that ground that she separates from him, the court cannot regard her desertion as continued from mere wilfulness.

The second element of desertion is the intent to desert; the defendant's absence must be wilful, it must be intended to be permanent, and this intent must continue the statutory time. By "wilful" it is not meant that the desertion must be malicious in fact, but something more than mere indifference must be shown. The separation must be deliberate; and a separation where the husband's absence is due to imprisonment, or to sickness, or under circumstances where a presumption of death is raised, is therefore not desertion.

Again, if the party who has left the other is

looking forward to a renewal of cohabitation, as where he or she is absent on business, or where there are pending treaties for a renewal of cohabitation, there is no desertion. Still, a woman's refusal to cohabit "under existing circumstances" her husband being poor, is a permanent enough intent.

Therefore, if the intent to desert does not exist when the separation takes place, the desertion begins only from the time that such intent is formed. So it usually ceases when the intent to desert stops. But if it exists when the separation takes place, the desertion does not cease because the deserting party becomes insane or is in prison.

In the case of a separation, that party is the deserter who has the intent to desert, no matter which one leaves the matrimonial home. A party who drives the other away is the deserter. A husband who gets his wife to go away on a visit, and then disappears, deserts her, though she has apparently left him; and the party who refuses to receive back one whose desertion has begun, but who has repented and asked to be taken back, is the deserter.

A separation by the mutual consent of the parties is not desertion by either. But either party may revoke such consent; and if the other party when applied to refuses to renew cohabitation, it is, from the time of such refusal, desertion on the part of said party. The consent need not be expressed; it may be inferred from conduct.

One party to a marriage is justified in leaving the other (1) by the latter's consent, express or implied; (2) by such conduct on the part of the other as is, as against such other, a cause for divorce; and perhaps (3) by such conduct on the part of the other as is cruel and outrageous, though not amounting to a cause for divorce.

The usual and correct rule is, that in the absence of consent, express or implied, one party is justified in leaving the other only by conduct which would justify a suit for divorce. Thus, one party may leave the other for such other's adultery or cruelty. Likewise during a suit for divorce. A wife need not live with her husband's mistress but, to follow the adjudicated cases, we find that one party cannot leave the other because such other has fits, or will not occupy the same bed, or gambles, or is poor, or is a drunkard, or is charged with being guilty of crime (this being no cause for divorce), or in case of a wife, because her husband will not make the servants mind her, or will not live with her father, or allow her son to visit her, or allow her to go to church, or because she fears having children, or because he alone cannot satisfy her sexual desires.

The allegations must set forth the desertion substantially in the phraseology of the particular statute; and the circumstances of the desertion must also be stated with some particularity. Thus an allegation of wilful desertion for more than one year is not sufficient under a statute requiring wilful, obstinate and continued desertion. Nor is "unnecessarily and without sufficient cause" sufficient for "without sufficient cause and without the assent"; nor is abandonment "more than three years ago" abandonment "for three years together," but the law is not as strict in regard to desertion as it is with regard to adultery and cruelty.

The proof must substantially conform to the allegations, and a good prima facie case of legal desertion must be made out. The separation and the intent to desert must therefore always be shown by the complainant, but under the more prevalent view the justification for separation is a matter of defense, and must be made out by the defendant.

The desertion may be proved by a great variety of circumstances, and under statutes the parties may in general testify themselves.

The defendant may deny the separation or the intent to desert, or, confessing these, may make pleas which are substantially those of connivance, collusion, condonation, or recrimination.

As has already been shown, drunkenness is not in itself a cause for divorce as cruelty, but by special statutes it is in itself, if habitual, a separate ground for divorce, in some states justifying absolute divorce, and in some only limited divorce. Most of the statutes state the cause simply as "habitual drunkenness"; some require it to have been acquired after marriage; some to continue one, two, or three years. The Kentucky statutes connect it with "wasting of estate," which includes wasting of time and health, when that is the man's capital.

There must be both drunkenness and a habit. Drunkenness is in this sense the effect of alcoholic liquors, not of opium or chloroform. A habit is the frequent and regular occurrence of excessive indulgence, or getting drunk whenever exposed to temptation, or being usually drunk in business hours, or being drunk for twelve or fifteen days at a time four or five times a year for fifteen years and generally being driven to drink by any excitement. Sometimes the statute requires the habit to have continued for a certain number of years. If the statute is silent in this respect, it perhaps makes no difference whether the habit was formed before or after marriage, though this proposition is open to grave doubt. But the habit must, it seems, be of such a character as to render the marriage state intolerable.

The allegations need not contain particular facts; it is sufficient when the statutory clause is

"habitual drunkenness," to allege it in those words without amplification. Still, it is always better to make the allegations too full than too general.

The proof in such cases does not involve any particular difficulties. What is habitual drunkenness is a question of law. Witnesses can testify only to particular facts. Expert testimony, therefore, is inadmissable. And the proof should correspond with the allegations.

As has already been shown, refusal to support is not a cause for divorce, as cruelty, or as desertion; but it is made a separate ground for divorce in many states, sometimes alone and sometimes connected with desertion or bad treatment. In some states it is a cause for absolute and in some for limited divorce.

The refusal or neglect to support must be wilful, and must be such as leaves the wife destitute of the common necessaries of life, or such as would leave her so destitute but for the charity of others. And the refusal must be of something which the husband has or might get; mere honest ability to support could never be a ground for divorce. If the husband's failure to support be due to mental or physical weakness, it is no cause for divorce.

The allegations may be in the general terms of the statute.

The proof of particular facts may be made under the general allegation, but neglect to provide, being one of ability, was held no proof of neglect to provide on account of idleness. The husband's ability to provide must be affirmatively shown.

The effect of imprisonment has been already discussed. But statutes make crime of various degrees a separate cause for divorce. Instances: "Extremely vicious conduct" in Maryland; "gross misbehavior and wickedness" in Rhode Island; "a crime against nature" in Alabama; "sodomy and

bestiality" in England; and "infamous crime involving the violation of conjugal duty, and punishable by imprisonment" in Connecticut; "fleeing from a charge of crime, the guilt being proved," in Louisiana.

These statutes do not seem to have given rise to any questions, though it has been held, under one of them, that it is not "gross misbehavior" for a husband to have a deep platonic affection for a woman other than his wife.

Insanity existing at the time of a marriage is a ground for the invalidity thereof, but insanity arising after marriage is not a cause for divorce under any other head, in the absence of special statutes; and such a statue seems to exist only in Arkansas.

As has been shown, one person may be divorced by a decree and the other still be married. To obviate this condition of things by a statute in some states, a divorce may be granted any person whose spouse has obtained a divorce in another state.

As has already been somewhat fully shown, it is considered contrary to natural justice to proceed to the determination of a suit without giving both sides an opportunity to be heard, and therefore the statutes of all states provide for a process to be issued to summon resident defendants into court, and for some kind of notice to be given to non-residents. We have also seen that if the statutes of the state on this subject are not conformed to, a decree of divorce will be void. For instance, if a wife is living apart from her husband without sufficient cause, his domicile is in law her domicile; and in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the state of his domicile, after reasonable notice to her, either by personal service or by publication in accordance with its

laws, is valid, although she never in fact resided in the state. But in order to make the divorce valid, either in the state in which it is granted or in another state, there must, unless the defendant appeared in the suit, have been such notice to her as the law of the first state requires. If the statutes of the state are conformed to, the decree will be valid within the state, but valid or void without the state, in accordance with the rules of international and interstate law. There are thus two kinds of notice: (1) notice by actual service of process within the jurisdiction of the court, which gives the court jurisdiction over the person of the party so served; and (2) notice by publication, and advertisement, through the post-office, which gives the court no jurisdiction in personam, but serves only to make the proceedings public, and to satisfy the demands of natural justice, in order that the court may pass a decree in rem respecting things within its jurisdiction. But each kind of notice is appointed for a special class of cases, and cannot be used for other cases. All questions of notice are waived by voluntary appearance.

Under the statutes, if the defendant be a resident or within the state, there must be actual service of process in strict compliance with the law. The service must be made by the proper party, and in the proper manner. Service is good although the party when served be in prison. If there are proper allegations and affidavit that the defendant is about to leave the state, a writ ne exeat may be served on him, or, in New York, he may be arrested.

Under the statutes, if the defendant be a nonresident, a notice by advertising the suit, or by publication, or by mailing a copy of the complaint to his address or his last address, or by some similar proceeding, is required. And legislatures have

power to allow divorces to be granted though no actual notice be given. Many states expressly allow notice of this kind by their divorce statutes, and a statute referring to all suits will be held to include divorce suits. Under the statutes, the bill must allege that the defendant is a non-resident, as temporary absence on a voyage will not suffice, nor will the fact that the defendant is in prison. And this must appear by affidavit or other proof; a return of non est from two counties is not enough. If publication has been duly made, the court must proceed to a decree. If it has been obtained by false affidavits, it is of no effect, and the judgment will be set aside for fraud. These statutes are construed as are similar statutes relating to other suits. It is disputed whether in the case of an amendment to the complaint after publication a new publication is necessary.

The defendant having been duly summoned, or publication having been duly made, if there is no appearance or defence, the court may enter a default, take testimony ex parte, and grant a divorce in accordance with the statutes. Such divorce will be valid within the state, and extra-territorially so far as it is in accordance with the international and interstate law, as already discussed. Whether a decree of divorce obtained by publication may, as other equity decrees, be subsequently reopened by a defendant who had no actual notice, is disputed.

When a bill has. been filed, and the defendant has been notified by summons or publication, he should appear and file his answer, plea, or demurrer. The answer need not usually be sworn to and is not in itself effective as evidence. In the answer the defendant may deny the charges and set up the several defences, or he may admit the charges and confess the bill. As many defences as

he desires to make may be joined in the same answer. The answer may be amended and new defences set up. And a general denial has sometimes been held to cover all the defences. The answer may take the form of a cross bill. The answer of a third party defendant should confine itself entirely to the charges against such third party. The practice of the ecclesiastical and the equity courts should be followed.

If the defendant does not answer, but allows the case to go by default, the suit is settled as against him, but not as against the state, and it does not entitle the complainant to a divorce. The court may take off a default and allow the defendant to answer. But while a default exists, the defendant can take no part in the suit, save as an amicus curiae. The default being entered the case goes on, and proof must be taken; and a divorce will be granted only if a good cause is made out and no defence appears.

If the defendant answers but merely confesses the bill and consents to a decree, the case must nevertheless proceed just as if there had been a default, for the state is a party, and a marriage cannot be dissolved by consent of the husband and wife. The parties may, however, dismiss the suit by consent as the complainant has the right to pardon all and any offences.

Cross-bills have already been somewhat discussed. The cross-bill may set up a cause for divorce against the complainant, but the charges of the original bill must be at the same time denied. The answer thus plays a double part, and the case made out by the cross bill may be prosecuted even after the original bill has been dismissed. The cross-bill in turn should be answered.

Besides the denial of the acts complained of,

there are five recognized defences to an action for divorce, as follows: (1) Connivance, or the complainant's consent to the acts complained of; (2) collusion, or the agreement of the parties to make up the case for the purpose of obtaining a divorce; (3) condonation, or the complainant's forgiveness of the acts complained of; (4) recrimination, or the fact that the defendant has a cause of divorce against the complainant; (5) delay or limitation, or that the complainant has suffered an unreasonable time, or a time limited by statute, to elapse since the occurrence of the acts complained of. These defences are all consistent with a general denial.

These defences existed under the old ecclesiastical law, and are recognized in the divorce courts of the United States independently of statute. But now in England, and in many states, statutes wholly or partially cover the subject. The trouble about the matter is, that so many new causes for divorce have been introduced that it is hard to know how far these defences will apply to them, as they originally wholly applied only to adultery, and partially to cruelty. It will be found, however, that the principles underlying these defences are nearly everywhere applicable, which principles must now be explained. Connivance and collusion both involve the prior consent of the complainant to the acts complained of, and are defences upon the general principle, volenti non fit injuria. Collusion differs from connivance in being confined to cases where the consent is mutual, and where the purpose is to obtain a divorce by the pretence or act agreed upon. Condonation is forgiveness or subsequent consent, and if too readily given may amount to connivance to future offences. Recrimination is a defence because the courts will not give relief to a guilty party, and because endless complications would arise if

the husband and wife could both be entitled to a divorce at the same time. Lapse of time is a defence because it raises a presumption of acquiescence or consent.

Other so-called defences can all be brought under these heads. For example, an agreement to withdraw or compromise a suit is no defence, unless it amount to condonation or collusion. So a deed of separation, while a defence to a suit for desertion, is no defence to a suit for adultery, unless made with a view to future intercourse, in which case it amounts to connivance.

The fact that a party has become insane after commiting the offense is no defence, but no divorce can be granted against a party who is dead.

As a general rule, the defences should be set up in the answer with all the particularity required of allegations in a complaint; but there are two exceptions to this rule. First, the bill of complaint (and indeed the proof) must not exhibit that there is a good defence, or the divorce will be refused though the defences be not pleaded; and second, there is a usual practice in some states by which the complainant is required in his bill to negative the defences, and if this is not done the defendant may have the bill dismissed.

The proof of the defences does not involve special difficulties. It should correspond with the allegations; and although in some states any defences could be proved under the general issue, generally the defences should be specially alleged. When the defendant must allege the defences, he must prove them. Connivance and collusion are disgraceful, and must be strictly proved; condonation may be even commendable, and such strictness is not required. In recrimination the countercharge must be proved just as it would if a charge.

Connivance is the complainant's consent to the commission of the acts complained of. It may be active, as where the complainant has brought about the act; or passive, as where the complainant, after due notice or warning, has taken no steps to prevent it. The defence which in law and reason is available to the party as the fullest contradiction of fact is, that the husband himself was the author and accomplice of the crime; that he has practised a train of conduct which led to her guilt, and which he foresaw and intended should lead to it; that he is, therefore, not the object of relief which the law gives to the innocent only. The conduct, then, upon which the wife relies for her defence is of a passive and permissive kind, to be proved therefore by circumstances. Active conspiracy appears in overt acts, but unless there are declarations to establish it, connivance must in general depend upon circumstances, and is to be gathered from a train of conduct which the court is to interpret as well as it can. An extreme case of connivance was shown in a New Hampshire case where a husband sold a night with his wife for a scythe and snath. In a case of connivance where a husband introduces a notorious debaucher to his wife, intending that she may be seduced, the mere fact of such introduction by him raises a presumption of intent that she shall be seduced. A husband who consents to the adultery of his wife cannot make her criminal act a ground for divorce. His consent bars his right to the decree. And a husband who endeavors to procure his wife to be hired into the commission of adultery will be regarded as consenting to all subsequent acts of adultery she may commit, whether they be committed with the person selected by him or with others. So it is when the husband gets a friend or agent to lead or entrap his wife into adultery. It will

be seen, therefore, that the defence of connivance is based on the maxim volenti non fit injuria, and on the principle that to one who consents, no wrong is done and no redress is due. A husband's consent is presumed if he knowingly allows familiarity such as usually leads to sexual intercourse. But the husband's conduct must be the result of his depraved morals, and not simply of his innocence or bad judgment, or his blindness resulting from trusting affection.

Connivance as a defence is particularly applicable to a charge of adultery; so it has been applied to a charge of drunkenness, when the complainant had supplied the liquor. In principle, if not in name, it is applicable to desertion, as no divorce will be granted for this cause if it appears that the apparently guilty party has left the other with the other's consent or through the other's fraud or force; also, to cruelty, as where a wife intentionally provokes or tantalizes her husband to misconduct.

The allegation of connivance is not strictly required, the public is a party, and the court would make the objection though the defendant does not, if the facts are brought to its notice. Still, it is better to allege it except in those states where the complainant is required to negative it in the complaint. A plea of connivance is consistent with a general denial.

The proof of connivance, especially in cases of adultery, must be very strict, as every presumption is against a husband being so debased as to consent to his wife's adultery. It cannot be readily presumed that any husband would act so contrary to the general feelings of mankind as to be a consenting party to his own dishonor, the effect of which would be to leave him legally bound for life to a

corrupt and adulterous wife. The proof need not be of connivance at the special acts complained of; general connivance will suffice. There must be proof of knowledge of adultery or of improper familiarities. What amounts to proof of actual knowledge and concurrence is a question which depends on the circumstances of each particular case. Indifference, ill-behavior, or cruelty, is not evidence of connivance. But want of attention to a wife's morals, to her conduct and associates, may be; as where a husband with perfect indifference allowed his wife to live with another man, and have children by him.

Collusion is the agreement of the parties to make up a case for the purpose of obtaining a divorce. It may be active, as where a husband agrees that he will commit adultery, that his wife may apply for and get a divorce from him; or passive, as where the understanding is that the defendant shall suppress facts which might constitute a good defence. By way of amplification it may be said that collusion, as applied to this subject, is an agreement between the parties for one to commit or appear to commit a fact of adultery in order that the other may obtain a remedy at law as for a real injury. Real injury there is none, where there is a common agreement between the parties to effect their object by fraud in a court of justice. If such conduct were permissible, it would authorize parties to violate their marriage vows and would encourage profligate and dissolute manners. The law, therefore, requires that there shall be no co-operation for such a purpose, and does not grant a remedy where the adultery is committed with any such view. It is a fraud difficult of proof, since the agreement may be known to no one but the two parties in the cause, who alone may be concerned in it, for the adulterer

may be ignorant of the understanding. However, it is no decisive proof of collusion that after the adultery has been committed both parties desire a separation; it would be hard that the husband should not be released because the offending wife equally wishes it; it would be unjust that the husband should depend on her inclinations for his release; he has a right to it.

Making up a fictitious case of any kind is a contempt of court.

Divorces are granted on public ground, and not to suit the desires of individuals. To constitute collusion, however, the parties must be acting in concert, and some imposition upon the court must be the purpose or result. Thus, while it is not collusion for a husband to support his wife during the suit, or for the wife to assist the proofs against herself, it is if the husband allows his wife support for her silence as to certain matters which might injure his case. Friendliness in carrying on the suit or even mutual assistance in proving the actual facts is not collusion. If the parties have made up a false case, or kept back evidence which might be a good defense, it is collusion. And likewise if one of the parties has committed the act complained of on the understanding that it should be made a ground for divorce. If a party to a suit by agreement with the other party procures the withdrawal from the notice of the court of facts relevant to the charge which is imputed to him or her, that is collusion.

Collusion as a defense does not materially differ from connivance, and is a defense applicable to any case.

As to the allegation of collusion, the same rules apply as those referred to under connivance.

The proof of collusion must be clear; it cannot be assumed from mere suspicious circum-

stances; and the defendant's confession of the charge is no proof of collusion.

Condonation is the forgiveness by the complainant of the act complained of, on conditions performed by the defendant. Condonation thus involves an act on the part of both parties.

The forgiveness (1) may be express or implied; (2) it must be accepted; (3) it must be freely given; (4) it must be given with knowledge of the delinquent's guilt.

The forgiveness may be expressed, as "I forgive you"; or implied as from sexual intercourse after knowledge of the offence.

The forgiveness must be accepted, for a mere rejected proposal to forgive, or willingness to forgive, would not suffice. There must be an acceptance on the part of the delinquent showing repentance and an intention to "sin no more."

The forgiveness must be freely given, and not obtained by force, or fraud and misstatements, or false promises.

The forgiveness must be given advisedly; the conduct alleged to have been forgiven must have been known. Suspicion without proof is not sufficient knowledge; and forgiveness of one act is not forgiveness of others not known or suspected.

The forgiveness is always conditional. The condition may be expressed, as that the delinquent shall cease all correspondence with his paramour; or it may be implied, for the law always implies the condition that there shall be no just cause for complaint in the future, or, as commonly stated, that the delinquent shall treat the condoning party with conjugal kindness.

If, therefore, after forgiveness of the defence charged, the defendant has given the complainant no just cause for complaint, the forgiveness will be

a good defence, but if the condition is broken it will be no defence.

As a defence, condonation is applicable to a charge of adultery, and of cruelty, and, in principle, to other causes for divorce.

The allegation of the defence of condonation, like that of other defences, should properly be made by the defendant, though in some states it must be negatived in the bill of complaint, and if it is made known to the court, no divorce will be granted in spite of its not appearing on the pleadings. So that no divorce will be granted if it appears that the parties have cohabited since the institution of the suit.

The proof of condonation need not be as strict as the proof of connivance, as the former is not a base and criminal, but often a generous and noble, act. Still it must be clearly shown that the complainant freely forgave the offense, and knew of the offense. Such knowledge may be circumstantially proved. Condonation is a fact for the jury to find under instructions. It may be proved under the general issue.

Recrimination is a counter-charge by the defendant of a cause for divorce against the complainant. When each party has a cause for divorce neither can obtain one.

Any cause for divorce is generally a good defence against any other. Under the ecclesiastical law recrimination, as such, was applied only in a case of adultery against adultery; but, as has been seen, separation was no cause for divorce as desertion if justified by adultery or cruelty and cruelty was no cause for divorce if both parties were equally to blame. So that in effect the then known causes for divorce destroyed each other. And statutes upon this subject have been held to be declaratory

of the common law, but whether they abolish adultery as an offense in other cases by making it an offense when the charge is adultery, is disputed; and a statute making "like offense" a defence, means thereby an offense which is likewise a cause for divorce. So that generally under the statutes any cause for divorce is a defence against any other, even though they be causes for different kinds of divorce.

And the defence of recrimination is thus an almost universal one.

The allegation of the counter-charge in recrimination should be made with the same particularity required of the same cause as the ground for divorce. And it may be alleged consistently with a general denial. And this plea may be put in at any stage of the case; if the offense has occurred after the filing of the answer it may be set up in any supplemental answer.

The proof of the counter-charge in recrimination must be the same as that required to prove the charge; and the proof must make out what as a charge would be valid ground for divorce. Thus adultery committed by an insane party is no defence. Nor is refusal to have sexual intercourse. Nor is desertion which has not lasted long enough to be a ground for divorce. Nor is an offense which has been condoned. Recrimination against a wife suing for divorce on account of cruelty was established in Texas by the fact that in one of the altercations she had knocked her husband down and beaten him severely.

Lapse of time between the commission of the offense complained of and the institution of the suit may constitute a defence independently of statute or by virtue of the statute. In the former case it is prima facie evidence of connivance, collusion, or

condonation; in the latter it is the defence of limitations.

Lapse of time is not in itself a bar to an application for divorce, independently of statute; but if unreasonable, it raises a presumption of consent or acquiescence, which presumption may be rebutted. Thus, where a man returns home and found his wife living in adultery with another man, and makes no complaint for twenty years afterwards he was held barred. Unreasonable delay is such delay as makes it appear that the petitioner is insensible of the injury of which he complains.

Two years unexplained delay has been held a bar, and nineteen years delay has been satisfactorily explained.

In many states there are statutes requiring a suit for divorce to be brought within specified times after the accrual of the cause. Such statutes apply only to the causes named. The time begins to run when the cause for divorce is first known, and runs on though the offense is repeatedly committed.

No divorce can be granted on the mere pleadings by default, or by consent, but only after full and satisfactory proof of all the essential allegations on which the right to release is founded. In this respect a divorce suit differs from the great majority of actions, and is like proceedings in equity relating to the lands of infants or insane persons. Proof was thus required by the unwritten law, and is in most states also required by statutes. Consult the statutes of the particular state.

A suit for divorce is a proceeding sui generis. It is partly a suit in equity, partly a suit in the ecclesiastical court, partly a civil suit, and partly a criminal prosecution. The rules of evidence are therefore somewhat obscured. But the general principles of civil suits, rather than those of criminal

proceedings, apply. The party charged with the offense must be presumed innocent until proven guilty; and the burden of proof is on the complainant to prove his case by a preponderance of the evidence; and the graver the offense charged, the stricter is the proof required. The proof should correspond with the allegations; proof without allegations is in many matters worth no more than allegations without proof. It is not sufficient that the court should be morally convinced of the guilt of the defendant; it must be satisfied that such conviction is founded on legal evidence applicable to legal charges.

As already stated, a divorce cannot be granted by consent; and as will be explained farther on, in most states the parties to a divorce suit cannot themselves always testify; but the confessions and admissions of the parties are often admissible as evidence, though in some states by statute and in some by the settled practice, no divorce will be granted on such confessions or admissions alone. But when a confession is full, confidential, reluctant, free from suspicion of collusion, and corroborated, it is the safest kind of evidence. A confession obtained by fraud will not be given any weight.

Evidence, if relevant, will not be excluded on account of its indecency. Although courts may not refuse to consider details, however offensive and disgusting, if they become necessary in the course of investigation, yet they should always require the witnesses to be examined in a spirit of due delicacy, avoiding vulgar and obscene language. So, if competent to testify at all, a wife may prove excessive intercourse; it is public policy which prevents a husband or wife from proving non-access, and not motives of decency.

The witnesses must testify to facts, and not to

opinions and conclusions, though the court may ask them their opinions. The opinions of experts are admissible in cases of impotence and insanity, but not in cases of habitual drunkenness. The widest latitude is allowed in cross-examining witnesses in divorce cases.

At common law the husband or wife could not testify for or against the other in any case, and this law prevails in the United States, so far as not modified by statute. It is not affected by the statutes destroying the incapacity arising from interest, for this incapacity depends on public policy. But express statutes remove this incapacity wholly or partially in many states. Still it must be noted that this rule excluding the husband does not apply to nullity suits, because they are a proceeding between parties not legally husband and wife.

The testimony of young children is admissible, but is not entitled to much weight. It is exceedingly unsafe to grant a divorce on the testimony of a young child, and courts are not disposed to encourage the blameworthy practice of calling children to testify against a parent. In some states there are statutes controlling the testimony of young persons. Not only is it wrong to the child to examine it as to its parent's chastity, but owing to its immaturity, its evidence is likely to be given without understanding, and with bias.

As divorce cases arise out of domestic troubles, the witnesses most likely to testify are the parties, their children, their connections, their friends and servants; all of whose testimony is admissible, but very likely to be colored by prejudice. A maid can hardly be expected to testify against her mistress.

Especially in cases of adultery, the complainant depends very often largely on the testimony of detectives, whose evidence is received with great

caution; of prostitutes, who, it is said, will sell their word as readily as their bodies; and of accomplices, whom a false feeling of honor justifies in saying anything to clear the accused. The testimony of such persons is admissible, but of no great weight without corroboration.

Courts rarely are willing to grant a divorce on the testimony of one person; but there is no rule in the United States, nor now in England, like that of the ecclesiastical courts, which required at least two witnesses to every fact.

The proof of each of the causes for divorce, and of each of the defences, has been briefly discussed under each of those heads, and there are no special rules relating to the proof of the jurisdictional facts. The only remaining subject of importance to be discussed is therefore the proof of marriage in divorce cases.

Generally, just as a marriage may be alleged it must be proved. Still, the object of statutes and rules requiring full proof in divorce cases is to prevent collusion in making out the grounds for divorce; and as marriage is not a ground for divorce, the reason does not apply to the proof of marriage, and many cases seem to hold that while all other matters must be proved marriage must be admitted, though this is also denied. If there be a default, or if the marriage be denied, it must be proved. If there has been no marriage, there can be no divorce, but only a decree of nullity. An agreement to marry will not suffice to base a divorce suit on. Nor will a marriage which has been dissolved by death. Nor one which has been dissolved by a valid and total divorce. But those divorces which have no extra-territorial effect over one of the parties do not so far destroy the marriage as to that party as to prevent a divorce.

Marriage in divorce cases may be proved by direct evidence of the celebration, or the contract, as the case may be; and it may also, except in certain cases, be proved by cohabitation and repute. The exceptional cases are those in which the proof of marriage would render acts (which would not otherwise be so), criminal, as suits where adultery is the ground alleged. Another exceptional case is that in which a marriage celebrated at a certain time and place is alleged, in which case no evidence can be introduced of a marriage by contract, or a marriage celebrated at some other time and place.

Provision is made by statute in most states conferring upon the courts, before which an application for divorce is pending, authority to make such decree as they may deem beneficial and expedient for the care and custody of the minor children of the parties; but such power would seem to arise upon the institution of the suit for divorce or separation in a court of chancery, independently of such statutes, as being embraced in that broad and comprehensive jurisdiction with which courts of chancery are vested over the persons and estates of infants, and which attaches whenever their aid is invoked with reference to an infant, although such aid is invoked only incidentally to some other matter which is the principal subject of controversy.

When once this jurisdiction attaches, it is ample, effectual, and far-reaching, so that occasion can rarely, if ever, arise for the interposition of any other court in relation to the custody of the children.

Pending the trial of such suit affecting its custody, the child is, in legal contemplation, in the custody of the court, and at all times subject to its order. Courts of common law will ordinarily decline to entertain jurisdiction upon habeas corpus, if it appear that there are proceedings in chancery rela-

tive to the custody, and it would seem that the chancery courts may even restrain such proceedings.

Whenever the custody of an infant is the subject of suit, the courts of chancery have full power to make interim arrangements for such custody. This power is to be exercised primarily for the benefit of the child, and such custody may be committed to either parent, or to a third party, upon such conditions and under such restrictions as the court, in the interest of justice and public policy, shall deem fit to impose.

Upon the dissolution of the marriage by absolute or limited divorce, the courts, looking mainly to the welfare and interests of the children, in the award of the custody should place them where such interests will be best promoted and their happiness secured. No certain rule for the government of the courts in such cases can be laid down, except this, that the best interests of the children must be consulted. The courts in such cases do not act to enforce the rights of either parent, but to protect the interests of the children. While the principle making the welfare of the children the paramount consideration in the determination of all questions relating to their custody, no matter in what form arising, is one of universal application. The pendency of a suit for divorce is said to be a circumstance requiring more than ordinarily free application of such principle.

If the child has arrived at an age of discretion to choose for itself, the general rule is that no restraint will be placed on its determination, and it will not be taken from one parent and given to another against its wishes. The "age of discretion" is ascertained not merely by the years of the child (there being, strictly speaking, no definite time

between birth and majority that can be designated as such), but by its capacity, information, intelligence, and judgment. If, in any proceeding touching its custody, an infant is able to make a proper choice, the court is, in a large measure, relieved from responsibility; and, with advanced years, approaching to majority, the choice allowed to an infant should increase, and to a large extent determine the custody. If the child has not arrived at an age of discretion, the courts, in their award of the custody, look primarily to the fitness of the parties, and their adaptability to the task of caring for the children, taking into consideration the age, sex, state of health, and other circumstances in the lives of the children, and excluding no sources of information or methods of investigation, that are likely to aid in making a proper selection.

Custody is ordinarily awarded to the innocent and successful party to a divorce suit; but there is no absolute rule upon the subject. The guilt or innocence of the respective parties, according to the reason and weight of the authorities, is material to the question of custody only so far as it relates to the fitness of the parties, for the task of caring for the children. It was held in New York, upon a proceeding by habeas corpus, that evidence of cruel treatment by the husband of the wife is relevant to the question of fitness for the custody of the child, since a father who is cruel to his wife is likely to be so towards his children. The leading principle here as upon other points is to consult the good of the children rather than the gratification of the feelings and wishes of the parents. Therefore the fact of either party's guilt is not sufficient to prevent an award of the custody to such party, if the interests of the children would be thereby subserved, and their welfare promoted.

The entire matter of the award is one largely of judicial discretion, and in the exercise of discretion, the courts often award some children to one parent and some to the other, having regard to age, sex, state of health, and other circumstances. Thus children of a nearly equal age, will as a rule be kept together, and the general inclination and tendency of the courts are in the direction of giving the younger children and female children of all ages to the mother; if the interest of the infant demands such a course, the custody may be awarded to a third party. Questions in regard to the religious education of the children are sometimes considered in the award of the custody, upon the separation of the parents by the English courts; but the American courts universally repudiate the notion that the question of religious belief can enter into the the determination of the custody. Yet upon grounds connected with the temporal interests of the children, the courts may confide the custody to a particular person, with a view of having them brought up in a certain religious belief.

The question of custody is not necessarily dependent upon the action of the court in regard to the divorce or separation of the parents. The courts may dispose of the custody upon a bill for alimony only, or upon a bill for divorce, even though the divorce be denied. But when a divorce has merely been applied for, and the court's action in relation to the children has not been invoked, the custody may afterwards be adjudicated in a separate proceeding by habeas corpus, but when the court has acted upon the question of custody in a divorce suit, its decree is res adjudicata, and cannot be collaterally impeached, or inquired into. The important distinction, must, however, be noted, that while such decree binds the parties inter sese, the children

themselves are not bound or concluded by the decree; so that if a question in relation to the custody subsequently arises upon habeas corpus, the award in the divorce proceedings cannot overbear the requirements of the good of the children, which may necessitate the determination without reference to the mere claim of the custody arising out of the decree. The extra-territorial effect of the decree as to the custody of the children has been upheld on the one hand and denied on the other and qualified in still another instance.

A decree in relation to the custody of the infant children of the parties in a divorce suit has been held to have the effect of constituting such infants wards of the court; and the courts may require the infants to be kept within the jurisdiction. The courts generally make provisions in the decree for access by the party not having the custody to such infants at reasonable times and places, but may restrain such party by injunction from interfering with such custody. The decree in such cases terminates the mere legal rights of the parent deprived of the custody, but not necessarily the liabilities.

The power to amend or modify the decree in relation to the custody of the children is provided for by statute in a number of the states. As to the power of the courts independently of such provisions, a conflict of ruling obtains. On the one hand it is affirmed that the infant children of the divorced parties are, in some sense, the wards of the court, and that the decree in relation to the custody may from time to time be modified as the circumstances may require under the general chancery powers. On the other hand the power is denied, and strictly construed even when given by statute.

A divorce suit may be terminated by a decree dismissing the bill of complaint which, unless made

"without prejudice," bars another action for the same cause. The bill may be dismissed on application of the defendant if the complainant does not appear when the case is ready or abandons the suit, or if the parties pendente lite resume cohabitation, or if both parties desire it, or if a defence has been established, or if there has been a verdict for the defendant and the time for asking for a new trial has elapsed. But the complainant cannot have his bill dismissed if a cross-bill has been filed. The decree may dismiss the complaint "without prejudice" when the merits of the controversy have not been determined; but not otherwise. Unless the bill is dismissed "without prejudice" no action can afterwards be brought on the same charges. A divorce suit may also be terminated by a decree of divorce a vinculo matrimonii; or by a decree a mensa et thoro; or by a decree of nullity of marriage; or the decree may entitle the party to relief unless within a given time a release to the contrary appears (decree nisi). And the decree may grant the other relief with the divorce or grant a divorce without giving the guilty party the right to marry again.

In some states the court does not, after hearing, immediately divorce the parties, but passes a decree nisi, which can be made absolute only after the expiration of a certain time, and provided no cause to the contrary is meanwhile shown. If any cause is shown, the decree nisi may be reversed; if not, it may be made absolute. Until the decree is made absolute the marriage is in full force, and the wife is still a married woman under all the disabilities of coverture.

As already stated, nullity suits or suits to have a marriage declared void, are not discussed in this chapter. Such decrees do not properly dissolve the

marriage, but declare that no valid marriage ever existed.

When the court grants a divorce, dissolving absolutely the mutual rights and obligation of the husband and wife, the decree is known as a decree of divorce, from the marriage bond, or a vinculo matrimonii.

Such a decree absolutely dissolves all marriage ties, and destroys the relation of husband and wife. After the date of the decree, the husband has no wife, and the wife has no husband, and the woman is a feme sole. Even if one of the parties is prohibited from marrying again, a marriage in defiance of such prohibition is not bigamy; not even in such case is sexual intercourse with another person adultery or any matrimonial offence. So after such a divorce, therefore, the man and woman are as strangers to each other; they may contract with each other and sue each other; and the one surviving does not represent the other as widower or widow, heir or personal representative. In the case of an absolute divorce, the woman after the man's death is not his widow, heir or personal representative. With such divorce, curtesy, and dower, and all marriage estates during coverture cease, as does a provision made for a woman "during coverture." Such a divorce dissolves a marriage as absolutely as death does. If the parties have different domiciles at the time of the decree beyond the state granting the divorce one may be divorced, while the other is not.

When the court grants a divorce which does not absolutely destroy the relation of husband and wife between the parties, but provides for their living apart, the decree is known as a legal separation, or a divorce from bed and board or a mensa et thoro. Such a divorce does not put an end to the

marriage ties, or destroy the relation of husband and wife, but simply suspends certain of the mutual rights and obligations of the parties, indefinitely or for a limited time, or till they become reconciled and live together again. Such a divorce does not enable the parties to marry again, nor does it affect their marriage property rights or estates dependent upon coverture; but it may put an end to their common interests, give the wife a standing as a feme sole, and otherwise change their legal condition. The survivor is a widow or widower.

When the court is so authorized by statute, it may, in granting an absolute divorce, prohibit the guilty party from marrying again during the other party's life time, or until some further decree; but a decree of this kind entered against the party who had not appeared or been summoned would have no effect, so it would be improper to enter such a decree, with a divorce a mensa et thoro; or when the prohibition is directly created by statute. Whether the prohibition is contained in the decree or in a statute, the effect is the same. Whether such prohibition has any effect outside of the state where the divorce has been granted is much disputed. In most states such prohibition is regarded as a penalty, and is therefore deemed to have no extra-territorial effect. But in Maryland and North Carolina it is held not to be a penalty but a denial of relief, and a continuance of the incapacity to marry which existed before the divorce. In these two states, therefore, as capacity to marry depends upon domicile, the prohibition would be held to have equal effect, wherever the party tried to marry, as long as such party retained his or her domicile; but in the other states the prohibition can be easily evaded. A New Yorker prohibited by a New York court, has but to step into New Jersey to be married, and the New

York courts will recognize the marriage. When such prohibition is recognized, a marriage in disregard thereof would be invalid, though it would not constitute bigamy or adultery.

As already shown, the decree may dispose of the custody of the children of the parties and also of their property; and it may likewise give relief connected with such property. So in many states the courts have the power to restore to the wife her original name, though this is unnecessary, as a woman after divorce may assume any name that pleases her. Except in trademark cases, there is no property in a name; and a person may with honest intent assume any name that he or she pleases without the aid of legislature or court. A wife need not assume her husband's name if she does not wish to and many actresses and literary women do not; and a woman may assume the name of a man that is not her husband. Since a name is thus merely a matter of reputation or choice, no decree is necessary to establish or change it. But in some states, in order that sanction and publicity may be given to a party's assumed name, the power to change the name is vested in some court, and the power to change the names of the parties or to restore to the wife her ante-nuptial or maiden name is often given to divorce courts. Still, it has been said that a woman is remitted to her former name and station by an absolute divorce; that the name that she acquired by her marriage becomes "her real name," and that she can acquire a new name after divorce only by reputation, and that there cannot be two women entitled to the name of the same husband.

After the final decree of divorce has been entered and the right of appeal has been lost or exhausted its determination, if it is valid, is conclusive upon the parties, and to a certain extent upon third

parties, but though a formal decree is prima facie valid, it may be shown to be void and of no effect, or to be voidable and be set aside.

The first distinction must therefore be made between such decrees as are void, and such as are merely voidable. A void decree is one that is of no effect, and the invalidity of which may be made to appear in any proceeding between parties; while a voidable decree is one the validity of which cannot be questioned collaterally, but only in a special proceeding before the proper court instituted by the proper party for the purpose of having it avoided.

Want of jurisdiction in the court passing it is the only cause which renders a decree of divorce absolutely void; fraud does not, nor does irregularity. As has been shown in discussing jurisdiction, a court may have no jurisdiction at all to enter a decree, or it may have jurisdiction only as to one of the parties; or it may have jurisdiction over the status of one of the parties, and not over the person of such party; and a decree may therefore be wholly or only partially void. And the record is only prima facie evidence of the jurisdictional facts that it states. Any person may therefore show in any kind of proceeding at law or in equity that a divorce, the existence of which is pertinent to the inquiry, was granted by the court which had not the proper jurisdiction, and is therefore of no effect whatever. Though such a decree need not be declared void, on proper application, the court granting it would set it aside as in the case of a voidable decree, and the court of equity would probably declare it void under its general jurisdiction. As above stated, fraud does not render a decree void, but only voidable; still, as the proceedings to have a decree set aside for fraud are not open to third persons, it has been said that third parties may collaterally question a fraudulent

decree, which thus becomes, as far as they are concerned, a void decree. If a party has joined in obtaining a void divorce he cannot set up its validity against the other party if such other party has married again, relying on the divorce.

Generally, a voidable decree can be avoided only by the court which entered it, though some cases hold that courts of equity may declare a divorce void on the ground of fraud. The power to vacate its judgments is the common-law power of all courts, and extends fully to judgments of divorce. And in some states the divorce courts have fuller and special powers given them.

The injured party can apply to have the decree avoided, but a third party cannot. The husband and wife can probably apply jointly; and this was done in a New York case in which the complainant after divorce became convinced of the innocence of his wife. But the party who has committed the fraud cannot apply, nor can one who has acquiesced in the decree. But the death or marriage of one party does not bar the application of the other.

Within the term during which the divorce is granted the court may vacate its decree for any cause within its discretion. But after the term the decree may be vacated only for irregularity, want of jurisdiction, or fraud. A mistake will not warrant the vacating of a decree, but may be corrected.

In vacating the decree the court follows its own practice, or, which is usually the same thing, the practice of the chancery courts. The application is duly made by petition or motion; the other party is notified, if possible, and proof in the shape of affidavits or in other form is considered. Before granting the petition the court will use great circumspection, and will not act, probably, if the divorce does not affect property or children.

When a decree of divorce is avoided it is rendered void ab initio; the marriage relation of the parties exists as if never interrupted. A second marriage by either of the parties is void, and gives no marriage rights, and no legitimacy to the children resulting from it.

If the final decree is against the complainant, and the bill is dismissed, it is conclusive, against such complainant, who cannot afterwards rely on the facts alleged. A decree dismissing the complaint is conclusive as to the charges therein set forth; and the same party cannot afterwards, even in applying for a different kind of divorce, allege the same adultery, cruelty, or desertion. But, of course, facts occurring after the filing of the first bill may be alleged in a subsequent case. But a dismissal of the bill "without prejudice" is not conclusive against the complainant; nor is a dismissal before final hearing or in a plea in abatement or a non-suit. If a divorce is granted and a decree is valid, it is conclusive upon the parties, of all facts found, and of all facts which might have been proved in support of the charges or the defences. Thus, it settles the fact that the parties were duly married. In case of an absolute divorce, the dissolution of marriage is settled and neither of the parties can maintain another suit for divorce. But statutes in some states allow one party to obtain a divorce, if the other has obtained a divorce in a different state, and so where the divorce is partially invalid, there may be enough left upon which to base another suit. Where a limited divorce was granted for cruelty, it was held conclusive as to cruelty in a subsequent application for an absolute divorce, for cruelty and adultery.

A decree divorcing the parties wholly or partially is conclusive on everyone as to their status. But such a decree is not conclusive upon third per-

sons not parties to the suit, as to the marriage of the parties, or as to their respective innocence or guilt. Thus, when a third person sued a husband for necessaries supplied his wife, a decree of divorce determining that the wife was apart from her husband by her own fault, or that she was or was not guilty of adultery was held not conclusive.

CHAPTER XIII.

ALIMONY

In divorce law alimony is the allowance which the husband pays by order of the court to his wife, while living separate, for her maintenance; or it may be a like provision ordered for the sustenance of a woman divorced from the bonds of matrimony out of her late husband's estate, the latter branch of the definition denoting a form of alimony known only to the modern law. It may be for the wife's use during the pendency of the suit, called alimony pendente lite, or after its termination known as permanent alimony.

Where alimony is granted as an incident of divorce, the court which has jurisdiction to decree the divorce, has also the power to grant alimony, provided it obtains jurisdiction of both parties; but if the divorce was ex parte and the defendant is domiciled in another state and does not appear, no alimony can be granted, unless he has been duly served with process within the jurisdiction of the court or appears and defends.

When the wife has obtained a divorce in one state with which no alimony was granted, she has, in some cases, been permitted to obtain in the court in the domicile of her husband, a decree for alimony. If after alimony is decreed the husband moves to another jurisdiction the decree can be enforced in the courts of the latter or by the United States courts.

Without domicile there is usually no jurisdic-

tion to decree divorce, much less alimony; the latter being an action in personam.

The legislature in granting a divorce cannot give alimony, but the jurisdiction to do so has been given by statute, or assumed by the courts in some states.

Alimony, under the English law, has no independent existence, and could only be granted as an incident to some other legal proceeding, and no court, not even the ecclesiastical, could grant it if it was the only relief sought. This doctrine was adopted and followed in many states of this country. But in some of these, statutes now provide for the wife's maintenance by the husband, where without her fault she is separated from him. This is in the nature of alimony, but is usually termed maintenance. Before the statutes were passed in some states, and in others where there is no statutory provision, the courts held that it is one of the ordinary equitable powers of a chancellor to grant alimony without a divorce, entertaining it as an original bill.

In those states in which jurisdiction is given to the courts to decree this maintenance, the statute which grants the power usually defines the circumstances under which the court may grant it. But in those states in which the courts assume the jurisdiction, the circumstances which may exist which entitle the wife are not so clearly defined. Desertion, leaving the wife without means, is a sufficient cause, but mere abandonment has been held insufficient. Cruelty is another cause, but generally it must be sufficient to entitle the wife to a decree a mensa et thoro. The wife must show rectitude of conduct on her part, if complaining of the ill conduct of her husband. She need not, however, be entirely blameless.

The court can only decree maintenance when the same causes exist as were required by the ecclesiastical courts to grant a divorce a mensa et thoro, or a restitution of conjugal rights. It has been decreed, however, on slighter grounds. As in the case of alimony, the court will not decree maintenance for a wife who has sufficient separate property for her needs. In general, the practice and procedure is analogous to that in suits for alimony with divorce. They must be living apart. The court must decree a periodical allowance, and not specific property, unless authorized by statute. And it has been affirmed in New Jersey and Mississippi and denied in Illinois that alimony pendente lite can be allowed during the suit. Alimony in divorce suits is now regulated in England, and in most of the United States by statute.

Alimony pendente lite is that alimony decreed to the wife during the pendency of the suit. This is also regulated by statute in most of the states, usually declaratory of the common law. The mere pendency of the suit where the wife has no separate means adequate to her support, and the husband has the means, entitles her, whether plaintiff or defendant, to alimony as long as the litigation continues. Alimony pendente lite to the husband under special circumstances as well as to the wife is allowed in Iowa, Wisconsin and Georgia.

As regards the marriage which must exist to entitle the wife to a decree of temporary alimony, as the merits are not gone into, the court will be justified in granting the decree if the parties had lived together and adjusted their property rights on the basis of the validity of the marriage. So alimony pendente lite has been allowed in nullity suits, and also where the wife alleges and the husband denies their marriage, though not where the

wife is complainant and asserts or is defendant and admits the invalidity of the marriage.

A suit must be pending either for a divorce or for separation. If the wife is complainant the husband must have been properly brought into court, until which time the court has no jurisdiction, as no suit is pending.

After the husband is summoned and until the suit has been dismissed, or a final decree has been entered, the wife may at any time apply for and the court decree temporary alimony. After final decree it is too late, so if the suit has been dismissed.

During the pendency of the suit the wife must be living separate from her husband. If they are living together the allowance would be improper.

If the wife has means sufficient to maintain her in the rank of life to which she is accustomed, no temporary alimony will be granted her. If the husband is destitute and the wife is complainant neither suit-money nor temporary alimony will be decreed; on the other hand if the husband is complainant and destitute, the court may suspend the suit until some provision is made for the wife, and if he cannot give her the means to defend herself, he cannot have a divorce.

The wife's application for alimony pendente lite must show merits, and should be supported by her own affidavit or that of others. It ought to allege separation, pendency of a suit, her need, and her husband's faculties and abilities. The husband if defendant may present affidavits as to his wife's means and his faculties, but not, it seems, if complainant.

The alimony pendente lite usually is made up of a sum to support the wife; to pay her counsel fees and the expenses of the suit. And this the court will award upon having the necessary facts

presented to it almost as a matter of course, despite a plea to the merits or even to the jurisdiction.

The court, however, will not grant alimony pendente lite if it appears that there was no marriage, or if the wife admits guilt or is greatly at fault, or does not make out a cause in her bill or is acting in bad faith, or if her husband is insane, and of course, if he does not appear.

It may be granted by the lower court or by the appellate court pending an appeal and even after verdict against the wife, if the cause has not yet had a final hearing. The award is a matter within the sound judicial discretion of the court. In some states the decree by the lower court, of alimony pendente lite is final, at least as to the amount. In others it is subject to appeal, where it may be annulled or altered. So the court which granted it may amend or revoke it.

The amount of alimony pendente lite is determined by no fixed rule, being in the discretion of the court in view of the circumstances of each case. The amount of alimony pendente lite is less than that of permanent alimony, and like permanent alimony is determined by considering the joint means, the husband's faculties, facilities and abilities, and the wife's property; whence the fortune or property came, whether from the wife or the husband, the ages of the parties, and the expenses to which they are subjected, and the custody and support of the minor children.

Taking all these circumstances into account, the court will award the wife her just proportion; as for instance, one fourth, one fifth, one eighth, one half, which may in the discretion of the court be increased or diminished as the cause progresses, or may even be revoked.

As a part of this alimony, or besides this al-

lowance, the court will also allow her suit-money and counsel-fees.

As shown before, alimony pendente lite may begin as soon as the husband is "in court"; and if the court does not annul the decree, it continues as long as the suit is pending, but ceases when the suit is dismissed, or the parties are reconciled, or one of them dies, or a final decree is entered.

Permanent alimony is that alimony which is granted after the termination of the suit.

The power to grant permanent alimony and the circumstances under which it may be decreed are regulated largely by statute. Generally it is allowed in any case of divorce absolute or limited, provided the marriage was a valid one.

But by statutes in many states it is allowed only when the divorce is for adultery or other fault of the husband, and by others when not for adultery or misconduct of the wife. In other states a certain part of the wife's estate, in the nature of alimony is given to the husband, and in some states no distinction is apparently made between the laws governing alimony to the wife and alimony to the husband.

The court may grant alimony, though not specifically prayed for if the proper facts are before the court. It usually, however, should be specifically prayed for either in the original bill, or by a petition or affidavit setting forth the husband's faculties and means.

It may be prayed for at any time before final decree or after final decree if the divorce is a mensa et thoro; though not, it seems, if a vinculo. The defendant should be allowed to answer unless he is in default. It is usually granted in the same judgment with the divorce, but may be in a separate one.

It may be ordered to begin from the date of

final decree, or from the beginning of the suit.

In the absence of statute, the award is usually a sum to be paid periodically, and not either specific property, or a sum in gross. But by statutes in some states, the court may award a specific part of the husband's lands, and in others in the discretion of the court either an allowance or a sum in gross.

In some states this is regulated by statute, but usually like alimony pendente lite it is left to the discretion of the court, who considers the circumstances of each case, taking into account the husband's faculties, the wife's means, the expenses to be borne by each, the support of the children, and the source from which the money came, whether from the husband or the wife; likewise the ages and abilities of the parties and their conduct, giving more to the wife if the husband was the offender than if she had contributed to the fault, and a bare maintenance if anything, if she were wholly wrong.

The court will also take into account what amount the husband can readily pay without rendering him destitute or impairing his business. If the parties have made a fair bona fide agreement, without any fraud, the court will adopt it as its decree.

And after due consideration of the circumstances of the case the following amounts have been awarded: one-third, one-half, from one-half to one-third, one-quarter, from one-third to one-quarter, two-fifths, not to exceed one-third his income as the maximum.

A motion or petition may be presented setting forth facts to lead the courts to increase or diminish the amount of alimony decreed. This they usually have the power to do in cases where the alimony was decreed in a divorce a mensa et thoro, or in cases of alimony without divorce. But not, it seems,

in cases where the court has no longer jurisdiction of the parties, as in a divorce a vinculo, or where the decree was a final settlement of the property-rights between the parties, unless the court has reserved this right in its decree, or it is given by statute, as it is in many states. The power is only exercised in a case that clearly calls for interposition, generally some marked change in the circumstances of the parties.

And from the decision of the lower courts, there is usually an appeal.

In the jurisdiction in which the decree was granted the court which granted it is the proper court to enforce it, and although it has been said that it is not a debt, yet it has been enforced as a judgment, and if parties reside in different states, by the United States courts; and has also been enforced in the different ways, according to the practice of the various courts, as an ordinary decree, by supplementary proceedings, by execution, by scire facias, by attachment, by sequestration, or by appointing a receiver, or by charging it on the land, or by proceedings for contempt.

As a general rule, alimony cannot be enforced after the death of either party.

After the suit has been begun the wife may present a petition or affidavit alleging that the husband is about to leave the jurisdiction, and upon this the court may issue a ne exeat republica, which will not be discharged until he gives security.

She may likewise obtain an injunction preventing the husband from alienating or charging his property. Courts have also charged it on the husband's land, appointed a receiver, assigned certain property in trust for the wife, and ordered the husband to give security for payment.

Permanent alimony ceases generally upon the

death of either party, or after reconciliation or by statute upon the re-marriage of the wife; and if the alimony was granted with a divorce a mensa et thoro, when they become divorced absolutely.

By statutes in many of the states, not otherwise, the court has the discretion to award specific property in place of alimony proper, thus dividing the property between the husband and the wife. In so doing they proceed upon the same principles that govern the award of alimony.

Other statutes provide for the restoration of the wife's property upon divorce, yet if the husband has settled property on the wife, the court may not grant the divorce unless she will execute a reconveyance of the property.

The wife's means are what she has or owns; the nature or source are immaterial; it may be her separate property or earnings, or she may be supported by her father, other relatives, or second husband. The general rule is that if the wife has sufficient means to support herself in the rank of life to which she belongs, no alimony, temporary or permanent will be awarded her.

The husband's faculties are what he has or can acquire by labor, mental or physical. From this his debts must be deducted, and if then the husband cannot support his wife, no alimony, temporary or permanent will be decreed against him. If he is complainant, however, and cannot give the wife alimony pendente lite the court will not permit him to proceed until he has made some provision for her.

THE END.

GLOSSARY

A

A fortiori:
By so much the stronger; all the more.

Ab initio:
From the beginning.

Actio personalis moritur cum persona:
A personal action dies with the person.

Ad litem:
For the suit.

A mensa et thoro:
Divorce from bed and board.

Amicus curiae:
Friend of the court; a stander by, not being a party to, or interested in the cause, who informs the court of any decided case, statute or other fact, of which it can take judicial notice.

A vinculo matrimonii:
Divorce from the bond of matrimony.

Ante-nuptial:
Before marriage.

C

Cestui que trust:
He for whose benefit another person is seised of lands and tenements, or is possessed of personal property.

Scire facias:
The name of a writ founded on some public record (Lat. that you make known).

Contra bonos mores:
Against sound morals.

Chose in action:
A right to receive or recover a debt, the money, the damages for breach of contract; or for a tort connected with contract, but which cannot be enforced without action.

Consent per verba de futuro cum copula:
Sexual intercourse in fulfilment of an agreement to marry.

D

Devastavit:
The mismanagement and waste by an executor, administrator, or other trustee of the estate and effects trusted to him as such by which a loss occurs.

De facto:
Actually; in fact; indeed. A term used to denote a thing actually done.

De son tort:
Of his own wrong. This term is usually applied to a person who, having no right to meddle with the affairs or estate of a deceased person, yet undertakes to do so, by acting as executor of the deceased.

De jure:
Rightfully; of right; lawfully; by legal title. Contrasted with de facto.

Detinue:
To hold from; to withhold. A form of action which lies for the recovery, in specie, of personal chattels from one who has acquired possession of them lawfully but retains it without right, together with damages for the detention.

Discovert:
Not covered; un-married.

Donatio mortis causa:
A gift made in prospect of death.

De novo:
(Lat.) Anew; afresh. When a judgment upon an issue in part is reversed on error for some mistake made by the court in the course of the trial, and venire de novo is awarded, in order that the case may again be submitted to a jury.

E

Emblement:
The right of a tenant to take and carry away, after his tenancy is ended, such natural products of the land as have resulted from his own care and labor. The term is also applied to the crops themselves.

Entirety:
This word denotes the whole, in contra-distinction to moiety, which denotes the half part. A husband and wife, when seised of land, are seised by entireties and not as joint tenants.

GLOSSARY

Estoppel:

The preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question. A plea which neither admits nor denies the facts alleged by the plaintiff, but denies his right to allege them.

Estovers:

(Estouviers, necessaries; from estoffer, to furnish). The right or privilege which a tenant has to furnish himself with so much wood from the demised premises as may be sufficient or necessary for his fuel, fences, and other agricultural operations.

F

Facie ecclesiae:

In face of the church.

Feme covert:

Married woman.

Feme sole:

A single woman, including those who have been married but whose marriage has been dissolved by death or divorce, and those women who are judicially separated from their husbands.

Fictione juris:

Judged to be false.

Flagrante delicto:

In the very act of committing the crime.

G

Garnishee:

A person who has money or property in his possession belonging to a defendant, which money or property has been attached in his hands, with notice to him of such attachment; is so-called because he has had warning or notice of the attachment.

H

Habeas corpus:

(Lat. that you have the body). A writ directed to the person detaining another and commanding him to produce the body of the prisoner at a certain time and place with

the cause of his caption and detention, to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf. This is the most famous writ in the law; and having for many centuries been employed to remove illegal restraint on personal liberty, no matter by what power imposed, it is often called the great writ of liberty.

I

Ignorantia legis neminem excusat:
Ignorance of the law excuses no man.

In pais:
This phrase, as applied to a legal transaction, primarily means that it has taken place without legal formalities or proceedings. Thus a widow was said to make a request in pais for her dower when she simply applied to the heir without issuing a writ; so conveyances are divided into those by matter of record and those by matter in pais. In some cases, however, matters in pais are opposed not only to matters of record, but also to matters in writing, i. e. deeds, as where estoppel in deed is distinguished from estoppel in pais.

Inter sese:
Among themselves.

Inter vivos:
Between living persons; as a gift inter vivos, which is a gift made by one living person to another. It is a rule that a fee cannot pass by grant or transfer inter vivos without appropriate words of inheritance.

In rem:
(Lat.) A technical term used to designate proceedings or actions instituted against the thing, in contra-distinction to personal actions which are said to be in personam.

In personam:
(Lat.) A remedy where the proceedings are against the person, in contra-distinction to those which are against specific things, or in rem.

J

Jure uxoris:
By right of a wife.

Jus disponendi:
(Lat.) The right to dispose of a thing.

L

Laches
Unreasonable delay; neglect to do a thing, or to seek or enforce a right at a proper time.

Locus standi:
A right to be heard. A right of appearance in a court of justice, or before a legislative body on a given question.

M

Malum in se:
Evil in itself; a crime by reason of its inherent character.

Matrimonia debent esse libera:
Marriage ought to be free.

N

Ne exeat republica:
A high prerogative writ, issuing out of a court of chancery to prevent a defendant debtor from going away and evading the jurisdiction.

Nisi:
Conditional.

Non compos mentis:
Not of sound mind, memory, or understanding. A generic term, including all the species of madness, whether it arises from idiocy, sickness, lunacy, or drunkenness.

Nunc pro tunc:
(Lat. now for then). A phrase used to express that a thing is done at one time which ought to have been performed at another.

P

Pari passu:
(Lat.) By the same gradation. Used especially of creditors, who, in marshalling assets, are entitled to receive out of the same fund without any precedence over each other.

Particeps criminis:
A partner in crime.

Pendente lite:
(Lat.) Pending the continuance of an action; while litigation continues. An administrator is appointed pendente lite when a will is contested.

Per se:
Taken alone, in itself, by itself.

Per verba de praesenti:
By words of the present; a promise.

Post-nuptial:
Something which takes place after marriage; as a post-nuptial settlement, which is a conveyance made generally by the husband for the benefit of the wife.

Power:
The right, ability or faculty of doing something.
The distinction between "power" and "right," whatever may be its value in ethics, in law is very shadowy and unsubstantial. He who has legal power to do anything has the legal right.
Technically an authority by which one person enables another to do some act for him.

Pro tanto:
(Lat. for so much).

Per autre vie:
An estate for the life of another.

Q

Quia timet:
(Lat. because he fears). A term applied to preventive or anticipatory remedies.

R

Res:
(Lat. things). The terms res, bona, biens, used by jurists, who have written in the Latin and French languages, are intended to include movable or personal property, as well as immovable and real property.

Res gestae:
(Lat.) Transaction; thing done; the subject matter.
Those circumstances which are the automatic and undesigned incidents of a particular litigated act, and which are admissible in evidence when illustrative of such act.

Res judicata:
A point already judicially decided.

S

Sub modo:
(Lat.) Under a qualification. A legacy may be given sub modo, that is, subject to a condition or qualification.

GLOSSARY

Sui juris:

(Lat. of his own right). Possessing all the rights to which a free man is entitled; not being under the power of another, as a slave, a minor, and the like.

Sui generis:

Of its own kind or class.

Civiliter mortuus:

In a state of civil death. In New York one sentenced to life imprisonment in State Prison is civiliter mortuus.

Seisin:

The completion of the feudal investiture, by which the tenant was admitted into the feud, and performed rights of homage and fealty.

Seisin in fact is possible with intent on the part of him who holds it to claim a freehold interest.

Seisin in law is a right of immediate possession, according to the nature of the estate.

Statute of limitations:

In 1623 by sta. 21 Jac. 1. c. 16, entitled, "An Act for Limitation of Actions, and for avoiding of Suits in Law," known and celebrated ever since as the Statute of Limitations, the law upon this subject was comprehensively declared substantially as it exists at the present day in England, whence our ancestors brought it with them to this country; and it has passed, with some modifications, into the statute-books of every state in the Union except Louisiana, whose laws of limitation are essentially the prescriptions of the civil law, drawn from the Partidas, or Spanish Code.

U

Ultra vires:

The modern technical designation, in the law of corporations, of acts beyond the scope of their powers, as defined by their charters or acts of incorporation.

User:

The enjoyment of a thing.

Usufruct:

(In civil law). The right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility, and advantage which it may produce, provided it be without altering the substance of the thing.

V

Vel non:

He dies intestate who either has made no will, or who has not made one legally, or whose will has been annulled or of whom there is no living heir.

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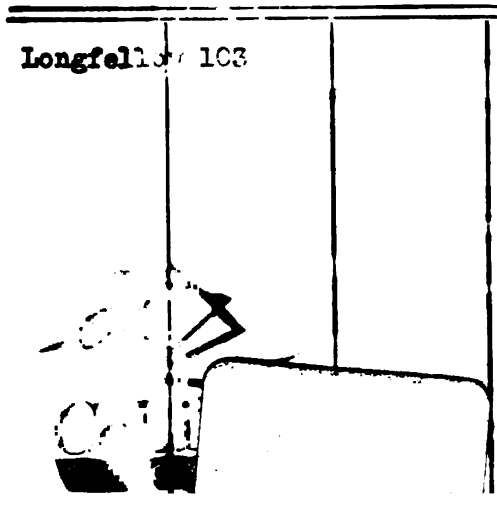
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